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THE OUTLAWRY OF WAR

A series of lectures delivered before the Academy of International Law at The Hague and in the Institut Universitaire de Hautes Etudes Internationales at Geneva

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PREFATORY NOTE

In the summer of 1928, Dr. Wehberg delivered at the Academy of International Law at The Hague a series of lectures on the outlawry of war. These were first published, in French, in the *Recueil des Cours* of the Academy. Later a revised and enlarged German edition was issued under the title of *Die Aechtung des Krieges*, and the latter forms the basis of the present translation by Dr. Edwin H. Zeydel of the University of Cincinnati. Dr. Wehberg has not examined the subject of outlawing war from the viewpoint of any one nation—or, indeed, of a single continent. Himself a scholar and an internationalist, he is familiar with the historical background as well as with the modern aspects of the question in both the New and the Old World, and he is able to interpret clearly and impartially the views prevailing in the two hemispheres.

Illness will not cure illness, and to the sober judgment of peace-time the futility of "war to end war" is apparent. Internationalists, statesmen, the man in the street, have come to the realization that the only effective and permanent solution of this, the greatest of the world's problems, is to place war completely outside the pale of law. The goal is plainly visible, and the ways and means of reaching it are being evolved with a heartening measure of success.

Today, therefore, it may be said with the assurance of conviction that, as the development of law within the state has caused private warfare to be replaced by the administration of justice in the courts, so with the further development of law in the international community, force will give way to the judicial settlement of disputes between nations, and war will be banished to the limbo of other crimes against civilization. It is with the belief that Professor Wehberg's examination of the ways and means advanced for reaching this goal constitutes an important contribution to the cause of peace, that the Carnegie Endowment for International Peace has issued this translation in its present form.

JAMES BROWN SCOTT,
Director of the Division of International Law.

WASHINGTON, D. C.,
June 7, 1931.

FOREWORD

The great question of the outlawry of war has for many years been in the center of discussion concerning the further development of international law. The efforts to eliminate war from the life of the nations, particularly by perfecting the organization of the states, are constantly growing both within and without the League of Nations. The Geneva Protocol, the Pact of Locarno, the Kellogg Pact, the Litvinoff Protocol, the report of De Brouckère in the commission of the Council, and the negotiations of the committee of arbitration and security are milestones on this road. In the present work I have attempted to record these efforts, being more concerned with the great line of development than with an exhaustive report of details.

In the great struggle of the League of Nations for the outlawry of war new ideas, recognizable at first only in their essentials, emerge for the careful observer. These point toward the future. As I try to show in this work, they tend particularly in the following directions:

1. It is certainly important to outlaw offensive warfare. But defensive war, too, should not be constituted as it has been. The first step in lessening the dangers of defensive warfare must be to deprive the individual state of the decision whether the *casus* of a defensive war is given, and to entrust the decision to an international organ.

2. The League of Nations should not, even after the beginning of hostilities, abandon its efforts for peace. When the danger is greatest its duties are most pressing.

If these ideas are pursued to their logical conclusions, it is clear that in international law of the future only the community of nations is competent to defend the vital interests of its members. The individual state will be empowered to execute military measures only in the capacity of mandatary of the community of nations. As the history of the League of Nations thus far has shown, this goal can be attained by an organic development of the existing principles of the community of nations.

This work studies not only the negotiations of the League of Nations but also the efforts on the part of non-members of the League to outlaw war. The writer is convinced of the necessity of cooperation between Geneva and Washington and attempts to build a bridge between the ideas of Geneva and those of Washington, as has already been attempted by others.

The French edition of this series of lectures, delivered in the summer of 1928, appeared in 1929 in volume 24 of the *Recueil des Cours* of the Académie de Droit international (Paris, Hachette). The German text has been expanded in several respects so as to take more recent developments into account.

HANS WEHBERG

GENEVA, *February, 1930.*

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PART I

HISTORICAL SURVEY

I. THE ANTECEDENTS OF THE MOVEMENT FOR THE OUTLAWRY OF WAR

The question of the outlawry of war, of the attempt to declare war illegal, has continually been coming to the fore during the last few years. Next to arbitration and disarmament it has become the central problem of international organization and of international law. The conviction has become stronger than ever that war must cease being a permissible means of settling international disputes.

This great movement, which has many adherents within and without the League of Nations, is in its present nature and form certainly a result of post-war developments. Yet it would be wrong to say that the attempt to restrict war by legal means was unknown in former times. Just as the general idea of peace had champions at all times and among almost all nations, so too the demand for the outlawry of war was already alive at an earlier time, though in a more primitive form.

§ 1. The Doctrine of the Scholastics Concerning the Just War

Roman law was familiar with the conception of the *bellum justum piumque*. The beginning of every war among the Romans was preceded by a ceremony of the fetiales, wherein the *pater patratus* summoned the hostile state to make reparation, *res repetere*, and invoked the punishment of Jupiter upon it: "*si ego injuste impieque illos homines illasque res dedier nuncio populi Romani mihi exposco.*"[1] If satisfaction was not rendered, war was considered to have been declared by hurling a lance into the hostile territory. It is true that the meaning of these customs is disputed. While Fusinato[2] and Lammasch[3] see merely formalities in them, Strisower[4] stresses the fact that material motives explain them. Fetial law, he claims, proceeds from the idea that the Roman people would commit an injustice against another nation if they began a war without reason. That subconsciously such considerations played a part in fetial law may be admitted. But because the *pater patratus* never investigated, and because—on account of the preponderance of the state over religion in ancient Rome—he was forbidden to investigate whether in any individual case the Roman claim for reparation was justified, the fiction arose that Rome always waged just wars. The cere-

[1] Titus Livius, Roman History, I, 32.
[2] *Revue de droit international et de législation comparée*, XVII (1885), pp. 288 ff.
[3] *Völkermord oder Völkerbund?* (The Hague, 1920), p. 40.
[4] *Der Krieg und die Völkerrechtsordnung* (Vienna, 1919), pp. 42 ff.

mony of the fetiales thereby became an empty formality, instead of being a barrier against the frivolous undertaking of wars.

A much higher value may be attached to the important investigations of the medieval church fathers, St. Augustine and Thomas Aquinas, concerning the justice of a war. Both tried to develop a concrete and juristic concept of the just war. St. Augustine, who lived from 354 to 430 A.D., called such wars just "which avenge injustices when a state or a city is to be punished which has neglected either to punish its citizens for an injustice or to return property unjustly taken away."[1] This definition was taken over by the *Decretum Gratiani* of the twelfth century,[2] which describes that war as just which is waged "in order to restore stolen property or to repel enemies." A century later Thomas Aquinas[3] studied the problem in greater detail. He stipulates three conditions before a war may be called just. In the first place the declaration of war must be made by the legitimate authority, in the second place there must be a *justa causa*, which in his opinion is to be found only in the fact "that those against whom war is being waged deserve this on account of some fault." In the third place the *intentio bellantium recta* should not be absent, i.e., the just intention of the belligerent "to do the good and avoid the evil."

This doctrine was later elaborated by two Spaniards in particular, the Dominican Franciscus de Vittoria (1480–1546) and the Jesuit Franciscus Suarez (1548–1617).[4] Both belong to the most important Catholic representatives of natural law. At the end of his life Vittoria was professor at the Spanish university in Salamanca, where in 1927, with the support of James Brown Scott, a Franciscus de Vittoria chair for international law was founded in memory of the great scholastic. At this university Franciscus Suarez also enjoyed his philosophical training. During the Middle Ages Suarez possessed tremendous authority. Hugo Grotius rightly said of him that he was of such penetrating depth that he hardly had an equal.[5]

These great scholastics constructed the ecclesiastical theory of the sixteenth and seventeenth centuries concerning the *justa causa*. They considered a righteous cause for war existent only if there was a serious moral wrong to be found on one side. They took the position that war was justifiable only if the injustice was undoubtedly on one side. In case the blame were distributed on both sides, war would be inadmissible according to them. It was also required by them that the moral guilt of the one side be absolutely clear. A mere subjective conviction on the part of the state invoking

[1] *Lib. quaest.*, VI, 10.
[2] *Causa*, XXIII, qu. II, c. 1.
[3] *Summa theologica*, II, 2, qu. 40, art. 1.
[4] Cf. especially Vanderpol. *La doctrine scholastique du droit de guerre* (Paris, 1919), and Stratmann, *Weltkirche und Weltfriede* (Augsburg, 1924), pp. 75 ff. and 103. See also Le Fur, "*Guerre juste et juste paix*," *Revue générale du droit international public*, 1919, pp. 9 ff., 268 ff., 349 ff.; Nys, *Les origines du droit international* (Brussels, 1894), pp. 95 ff. Also James Brown Scott in The Problems of Peace, Lectures delivered at the Geneva Institute of International Relations (London, 1927), p. 209. Finally Wegner, "*Ueber gerechte und ungerechte Kriege*," *Zeitschrift für öffentliches Recht* (Vienna and Berlin, 1926), V, 528 ff.
[5] Cf. De Scorraille, *La vie de Fr. Suarez* (Paris, 1913), I, 437.

armed hostilities that the other side is guilty was not sufficient for them. It was also emphasized by them that the evil of war must be commensurate with the moral guilt of the party attacked. They considered it an important prerequisite, too, that the war must really seem necessary in order to bring about the triumph of righteousness. War was not deemed permissible so long as there was a possibility of a settlement by arbitration. Nor could war be begun if it were prejudicial to Christianity as a whole. The great idea of the common interests of the peoples was brought in express harmony with the fundamental theories of Vittoria and Suarez. These and other prerequisites for a just war were connected with the thought that the state taking up arms was regarded in a certain sense as the servant of God waging a war of execution for the restoration of righteousness. Hence the party resorting to the use of force could undertake the war only if his victory was assured. As a logical development of this theory, Soto and Bellini voiced the opinion that the attacked state, being morally guilty, could not defend itself.[1]

To the three conditions of Thomas Aquinas, according to which the just war presupposes an order by the legitimate authority, a righteous cause and the right intention, Suarez and Bellarmin added as a fourth condition the *debitus modus*, the right means of warfare.[2] The conduct of the war was to be kept within the bounds of righteousness and was never to be directed against persons who cannot defend themselves.

There can be no doubt that the scholastic doctrine of the just war signified a considerable limitation of war. That has been acknowledged repeatedly in recent times. Especially the Frenchman Vanderpol and the German Dominican Stratmann have proved by careful investigation that the doctrine of the scholastics concerning the just war was very progressive for their time. Stratmann writes that the exigencies of Catholic morality concerning the legitimacy of war "make it almost impossible legally."[3] He proves also that if the great ideas of St. Augustine, Thomas Aquinas, Vittoria and Suarez, as well as those of their immediate successors, were purely applied, "a just aggressive war would practically never be possible."[4]

One will have to agree with this when one realizes that the doctrine of the just war is based on the assumption that war is necessary in the absence of an international court of arbitration. This idea is at the bottom of all the theories of the scholastics. It was frequently emphasized, particularly by Suarez, Vasquez and Navarro.[5] But to-day it is possible in every case to have recourse to the Permanent Court of International Justice, an arbitral court or a board of mediation. The pacific settlement of disputes has been so

[1] Cf. especially Vanderpol, *op. cit.*, pp. 29 ff. Cf. also Stratmann, *op. cit.*, pp. 79 ff.
[2] Cf. Stratmann, *op. cit.*, pp. 96 ff. See also Vanderpol, *op. cit.*, pp. 151 ff.
[3] *Op. cit.*, p. 98. Cf. also Ter Meulen, *Der Gedanke der internationalen Organisation in seiner Entwicklung 1300 bis 1800* (The Hague, 1917), p. 37, concerning the meaning of the doctrine of the just war.
[4] Stratmann, *op. cit.*, p. 89.
[5] Cf. especially Lammasch, *op. cit.*, pp. 44 ff.; Lange, *L'Histoire de l'Internationalisme* (Christiania, 1919), p. 288; Stratmann, *op. cit.*, pp. 81, 82, 103; Vanderpol, *op. cit.*, pp. 93, 128 ff.

far developed in international law that it is always possible to settle a dispute by international legal procedure, provided the parties are so disposed. Hence this procedure must be applied in place of war, according to the doctrine of the just war.

In Vittoria's doctrine it is also to be considered that in consequence of the principle of the solidarity of Christendom no war may be conducted which prejudices Christendom as a whole.[1] Now, is not the danger present in most cases to-day that an isolated war may set a whole continent on fire, especially since the members of the League of Nations are bound to wage a war of execution against a violator of the law? And does not a war nowadays have a deleterious effect upon almost every state on account of the interdependence of the economic interests?

According to the doctrine of the scholastics a war may be begun only in case the moral guilt attaches exclusively to the attacked state.[2] Yet a state or group of states can but seldom maintain that the entire blame lies with the opponent. Different conclusions will be reached, depending upon whether one considers the events immediately preceding the war or whether one goes farther back. At any rate the blame will in many cases attach more to one side than to the other. But this assumption is, according to the scholastic doctrine, not sufficient to justify the war of the attacking state.

Moreover, the evil of the war must be commensurate with the moral guilt.[3] Yet if we remember how dreadful the devastations of a modern war are, the guilt must be quite diabolical to justify a war. The guilt rarely extends to the entire population of the attacked state in a manner to justify the death and mutilation of so many people.

If finally Suarez and Bellarmin demand that war be conducted in a right manner, it must be said that the modern poison-gas war, directed against women and children as well as against combatants, can never be justifiable according to the medieval scholastic doctrine.

It is regrettable that since the sixteenth century, as Vanderpol[4] shows, the rigorous doctrine of the scholastics has been continually weakened. Even Suarez had set a bad example in this respect by defending the thesis that the blame does not necessarily have to be restricted to one side; that it is sufficient if after careful study of the facts there are better reasons for the right of the aggressor than for that of the attacked. Later no moral guilt at all was required, only the material injustice on the part of the attacked state. Finally it was declared that a war may be just on both sides.

It will be asked what the attitude of Hugo Grotius and his successors was toward the scholastic theory of the just war. Did not these teachers of international law deem it their duty to support and develop that doctrine which is so favorable for the limitation of war?

[1] Cf. Lammasch, *op. cit.*, p. 46; Lange, *op. cit.*, p. 271; Stratmann, *op. cit.*, pp. 92, 103; Vanderpol, *op. cit.*, p. 92.
[2] Cf. Stratmann, *op. cit.*, pp. 84 ff.
[3] Cf. *idem.*, p. 90; Vanderpol, *op. cit.*, p. 146.
[4] *Op. cit.*, pp. 255 ff.

As for Hugo Grotius, he took over the doctrine of the just war as it had been developed by his predecessors. He introduced a new element only in holding that war as a war of execution should and must be waged not only for one's own right but also for the right of others. The idea that war may be conceived only as punitive war in the service of justice was thereby logically developed.[1] For the rest it cannot be said that Grotius considered the just war from a new, original point of view.[2]

The later jurists did not allow the doctrine of the just war to be completely forgotten,[3] but they dealt with it only incidentally[4] and did not try to develop it on the basis of its modern evolution. The prevailing doctrine of international law in the eighteenth and nineteenth centuries was hardly familiar with types of war forbidden from the point of view of law. It emphasized only certain moral obligations which the states had to fulfill in this respect.[5]

This development of the doctrine of the just war evidently had a close connection with the fact that the unity of the Christian world had been destroyed in the Middle Ages by the Reformation. The idea of the community of peoples became of secondary importance. Instead the idea of the sovereignty of the individual states took the lead.[6] The jurists of the eighteenth and nineteenth centuries did not oppose such a development. On the contrary, they regarded the *jus belli ac pacis* as an important part of the independence of the individual state. But meanwhile, in thinking too much of the idea of what is legal, they forgot, to use an expression of Anselm Feuerbach, the idea of what is just. Under these circumstances the statesmen found it easy to declare every war justified, especially since, to quote Immanuel Kant, they invoked the opinion of the jurists only to defend war but never to prevent it.[7]

§ 2. The Ideas of the Champions of a League of Nations

A. Before the war

So far as the champions of international understanding are concerned, they have from the beginning turned their attention above all to the creation of an international organization and a system of international arbitration, through the existence of which war between individual states would lose its *raison d'être*. A league of nations and arbitration were particularly

[1] Cf. *De jure belli ac pacis*, II. xxv. 6.

[2] Cf. Bourquin, "*Grotius et les tendances actuelles du droit international*," *Revue de droit international et de législation comparée*, 3d ser., VII (1925), 112 ff.; Knight, The Life and Works of Hugo Grotius (London, 1925), p. 201; Lange, *op. cit.*, p. 316.

[3] Cf. Le Fur, *op. cit.*; Strisower, *op. cit.*, pp. 13 ff.; also Redslob, *Histoire des grands principes du droit des gens* (Paris, 1923), pp. 469 ff.

[4] Cf. Lammasch, *op. cit.*, p. 50.

[5] Cf. Tambora, "*Das Recht Krieg zu führen*," in *Zeitschrift für internationales Recht*, XXIV, 41 ff.

[6] Walther Schücking, *Die Organisation der Welt* (Leipzig, 1909), pp. 37, 39.

[7] *Entwurf zum ewigen Frieden*, chapter entitled "*Zweiter Definitiv-Artikel*"; also Ter Meulen, *op. cit.*, p. 326.

in the center of the great projects of William Penn, Abbé de Saint Pierre and Immanuel Kant. When the peace movement was organized in the course of the nineteenth century and gradually took a stronger hold upon public opinion throughout the world, the idea of forbidding war or of declaring it a crime was not placed at the head of the peace program, either. Settlement of all disputes by arbitration and disarmament were the primary demands made at the end of the nineteenth century by the Interparliamentary Union,[1] the world peace congress[2] and the peace societies of the individual countries.[3]

But even if, in the main, war was combated only indirectly, even if the problem of the outlawry of war in its present form was unknown before the war, yet even before the war the question of the justification of armed conflicts was a burning one for those interested in the peace movement. The Paris World Peace Conference of 1878 adopted a resolution which declared "*que la guerre offensive est un brigandage international.*"[4] The majority of the members of the peace societies before the war took the position that aggressive war, not however defensive war, must be rejected. When therefore the third and seventh world peace congresses at Rome and Budapest in 1891 and 1896 adopted provisional principles of international law, they recognized the right of the states to defend themselves. No one arose at that time to combat the right of self-defense.[5]

But when later the former French captain of artillery, Gaston Moch, one of the veterans of the peace movement before the war, made the motion at various world peace conferences[6] that the right of self-defense be exactly determined and that only that state be permitted to exercise it which has already made an honest proposal to its opponent to settle the dispute peaceably, it appeared that a considerable number of English and American advocates of peace denied the right of defensive warfare for religious and other reasons. This view was held by the minority in the world peace congresses. But it was not deemed proper to decide the question by a majority vote; the difference of opinion on the right of self-defense was merely recorded. Continental adherents of peace, especially in Belgium, Germany, France and Austria-Hungary, expressly recognized, during these negotiations, the admissibility of defensive warfare. Among them were the winners of the Nobel prize, Alfred H. Fried, Henri La Fontaine and Ludwig Quidde.[7]

[1] Cf. *Union Interparlementaire, Résolutions des Conférences et Décisions principales du Conseil* (2d ed. by Chr. L. Lange, Brussels, 1911), pp. 7 ff.

[2] *Résolutions textuelles des Congrès universels de la Paix* (Berne, 1912), pp. 1 ff.

[3] Cf., e. g., the statutes of the French Peace Society, La Paix par le Droit, or those of the Deutsche Friedensgesellschaft.

[4] *Résolutions textuelles des Congrès universels de la Paix*, p. 1.

[5] *Troisième Congrès international de la Paix* (Rome, 1892), pp. 142, 143; *Bulletin officiel du VII Congrès universel de la Paix* (Berne, 1896), pp. 46–55.

[6] *Bulletin officiel du VIII Congrès universel de la Paix* (Berne, 1897), pp. 43 ff.; *Bulletin officiel du XII Congrès universel de la Paix* (Berne, 1903), pp. 136 ff.; *XVIII^e Congrès universel de la Paix* (Stockholm, 1911), pp 218 ff.

[7] Cf. Wehberg, "*Der Verteidigungskrieg auf den Weltfriedenskongressen der Vorkriegszeit*," *Friedenswarte*, 1924, pp. 330 ff.

The question of the punitive war (Sanktionskrieges) was taken up at a late date in peace circles, namely at the World Peace Conference at The Hague in 1913. The ideas concerning the legitimacy of the military application of sanctions were so divergent in each congress that no definite resolution was passed on this subject, either.[1] Among the peace advocates this question led to the same differences to which it led among the jurists. When Professor C. van Vollenhoven of Leyden proposed, in 1913,[2] the creation of an international fleet which would act in the case of violations of the decisions of international courts or of neutrality, only Erich,[3] van Eysinga [4] and Schücking [5] were favorable to the proposal. The jurists as well as the peace advocates before the war were silent on the question of execution. This is all the more surprising since in the organization projects up to the end of the eighteenth century, as Ter Meulen has shown,[6] the idea of execution appeared again and again; it also played an important part in the plans of the two great Quakers William Penn [7] and John Bellers.[8] Probably this circumstance is due to the fact that the problem of organization had before the war been relegated far to the background and that the discussions were restricted to arbitration and to the limitation of armaments.

The period before the war, therefore, by virtue of its essential tendencies, accorded the problem of the outlawry of war only a secondary importance. This was quite clear during the discussions in the two great Hague Peace Conferences. Aside from the laws of war, perfection of arbitration and limitation of armaments were the subjects of most of the deliberations. Elsewhere the same tendencies prevailed. The so-called Bryan treaties are most nearly the forerunners of the movement to outlaw war. These treaties in effect prohibited every war which was not preceded by an international investigation. But even they did not attempt to declare a defensive war criminal.

B. After the outbreak of the World War

Surprising though it is, the idea of the outlawry of war did not assert itself after the outbreak of the war. In many drafts, and particularly in the best known drafts of a league of nations, only the attempt of a peaceful settlement of disputes was declared obligatory, on the plan of the Bryan treaties. But a decision of conflicts by war, after the failure of eventual attempts at settlement, was not prohibited. Of the private drafts which expressed different opinions, that of the Belgian Paul Otlet, who in 1917 declared every war a "crime against humanity," deserves special mention.[9] In the last year of the war the view that every war between individual states should be

[1] *Bulletin officiel du XX^e Congrès universel de la Paix* (La Haye, 1913), p. 110.
[2] Roeping van Holland, *De Gids* (Amsterdam, November, 1910).
[3] *Probleme der internationalen Organisation* (Breslau, 1914), pp. 54 ff.
[4] "*La Police Internationale*," *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, 1911, pp. 527 ff.
[5] *Der Staatenverband der Haager Konferenzen* (Munich and Leipzig, 1912), p. 289.
[6] *Op. cit.*, pp. 348 ff. [7] *Op. cit.*, p. 174. [8] *Op. cit.*, p. 178.
[9] Art. 10 of the *Constitution mondiale de la Société des Nations* (Geneva, 1917).

prohibited was affirmed. To be sure, an indirect interdiction of every recourse to war by virtue of the principle of unlimited arbitration was contained in the principles of the French Ministerial Commission for the League of Nations,[1] the draft of Colonel House,[2] and the first draft of President Wilson.[3] After the armistice, the official commissions of Italy,[4] Switzerland,[5] and the Netherlands,[6] and later of the German Reich[7] expressed themselves in favor of prohibiting all wars among states belonging to the League of Nations.

On the other hand, in the later drafts of Wilson as well as in the draft of the British Government the absolute interdiction of war does not figure. Nor does it figure in the Anglo-American draft which finally became the basis of the deliberations of the Paris League of Nations commission.

When the Pact of the League of Nations was drawn up, the question whether war should be prohibited to members of the League by prolonging the clauses of the Anglo-American project, did not play a decisive rôle. Even among the proposals submitted to Wilson during his stay in America from February to March, 1919—proposals which tended to improve the first part of the draft of Paris—none became known which envisaged the absolute interdiction of war. Finally the following should be noted. At the very time when the Allies imposed upon the Central Powers the most rigorous limitations of their sovereignty, particularly regarding the status of their armaments, it never occurred to them to deprive these powers of the *jus belli ac pacis*, which up to then had been unlimited. After the establishment of the League of Nations, a paradoxical situation arose. The conquerors had imposed upon themselves limits of their right to make war. But they had failed to do the same for their former opponents, who were not yet members of the League.

If one wishes to avoid criticising excessively the timidity of the Pact, it must not be forgotten that a great number of private drafts made during the time of the hostilities also admitted war under certain limited conditions. The celebrated Central Organization for a Durable Peace, in particular, did not, in its program of minimum demands, include an absolute interdiction of war. Scholars as eminent and liberal as Lammasch[8] and Schücking[9] did not think at the end of 1918 that a general interdiction of war for states belonging to the League was practicable.

Yet it may be said that the Commission of Paris, at the moment it took up its work under the direction of Wilson, would have been supported by public opinion had it declared itself in favor of outlawing war. The best proof of this is the following fact. After the publication of the first draft of Paris

[1] Cf. Bourgeois, *Le Pacte de 1919 et la Société des Nations* (Paris, 1919), p. 200.
[2] Arts. 10 ff.
[3] Arts. V ff.
[4] Art. 1c.
[5] Art. 3 of the preliminary draft.
[6] *Völkerbundprinzipien*, No. 5.
[7] Art. 1, 29.
[8] *Der Volkerbund zur Bewahrung des Friedens* (Olten, 1918), p. 48.
[9] *Internationale Rechtsgarantien* (Hamburg, 1918), p. 11.

(February 14, 1919), the important conference of the neutral states at Paris,[1] then a series of private manifestations,[2] namely, the Conference of the Inter-allied Associations for the League of Nations at London, the International Conference for the League of Nations at Berne, and the International Socialist Congress at Amsterdam demanded that the Pact be revised in the direction of a complete interdiction of war. But at that time Lord Robert Cecil[3] declared categorically in the name of the Paris Conference that it was not possible to realize these proposals. Thus a favorable opportunity was lost. What the deliberations of a relatively restricted commission could definitely have regulated was left to the uncertainty of future development.

The cautious attitude of the Paris Commission was, of course, disappointing. But we should not overlook the very decided progress which it achieved by adopting Articles 11 to 17 of the League of Nations Pact in preference to the laws which had formerly prevailed.

II. THE WAR AND THE COVENANT OF THE LEAGUE OF NATIONS

§ 1. Articles 11–17 of the Covenant

The Pact of the League of Nations[4] is dominated by the principle that war between members of the League should not be regarded as prohibited, except in definite cases. This principle follows from the preamble, where it is stated that for the purpose of developing cooperation among the nations and in order to guarantee peace and security it is essential to accept certain obligations not to resort to war. To the extent that no special interdiction, express or tacit, can be deduced from the Pact, members of the League may in future, too, settle a dispute by arms. The Pact distinguishes between permissible wars and prohibited wars.

War is forbidden, first of all, according to Article 12, paragraph 1 of the Covenant, before the conflict has been submitted to arbitral jurisdiction and judicial settlement or to the examination of the Council. Moreover, according to Article 12, paragraph 2, of the Covenant, recourse to war can in no case be had until three months have elapsed after the arbitral or judicial decision, or after the report of the Council. If the parties submit their dispute to arbitral jurisdiction, the decision of the arbitrator is obligatory, and the conflict can not be settled by arms against a state which has submitted to arbitral decision (Article 13, paragraph 4). This clause contains nothing new with respect to previously existing law. For if two states submit to the decision of an arbitral tribunal, they bind themselves thereby to agree to that decision and they renounce a solution by force of arms. The interdiction of a settlement by arms is supported in this case not so much by the

[1] Cf. Munch, *Les origines et l'oeuvre de la Société des Nations* (Copenhagen, 1923), I, 169.
[2] Kluyver, Documents on the League of Nations (Leyden, 1920), p. 308.
[3] Cf. Munch, *op. cit.*, p. 170.
[4] Schücking-Wehberg, *Die Satzung des Völkerbundes* (2d ed., 1924), p. 466. Cf. also W. E. Rappard, International Relations as viewed from Geneva (New Haven, 1925), p. 100.

special provisions of the Pact as by the compromise concluded by the parties.

On the other hand, there is an important innovation in case the parties have submitted their dispute to the scrutiny of the Council of the League of Nations. In principle the Council intervenes here only as a mediator. The parties have full freedom to accept or reject the report of the Council. If however the report of the Council is accepted unanimously (unanimity does not take into account the representatives of the interested parties), then, by virtue of Article 15, paragraph 6 of the Pact, war cannot be waged against the party submitting to the conclusions of the report.

Finally war is interdicted against a state for which the Council or Assembly have, by virtue of Article 15, paragraphs 8 and 10, recognized that in international law the said state is exclusively competent so far as the case in question is concerned. This interdiction follows from the basic thought underlying Article 12 of the Covenant. This presupposes that every dispute not decided by arbitration shall be submitted to the Council for examination. But this provision can be carried out only if the Council takes up the matter in question both from the formal point of view and from the material aspect and is able to draw up a report which may have the juridical consequences foreseen in Article 15, paragraphs 1 to 7. But concerning questions for which a state possesses exclusive competence, Article 15, paragraph 8, forbids expressly a material examination. It is therefore in conformity with the true spirit of the League of Nations to declare war impossible in such a case. But it must be admitted that prevailing opinion supports the opposed theory.

There is one fact which deserves to be stressed particularly. Aggressive war, in the five cases just mentioned, is prohibited only between states belonging to the League of Nations but not between a member state and a non-member state or between two non-member states.

Pursuant to the Covenant, defensive war is never prohibited. According to a widespread opinion, the military defense of a country is not only a right but even a duty for a member state of the League. It is affirmed that in accordance with Article 16 of the Covenant, only a state which defends itself can lay claim to the military support of the other powers. This question will be taken up in greater detail in another chapter. But we may say this much now, that without doubt the state responding best to the spirit of the League of Nations and of the Covenant is the one which first of all tries to rid its territory of an aggressor by resorting to means which are not military. For it is difficult to establish a distinction between defensive war and offensive war. That is why the theory which prescribes a defensive war must be questioned all the more, since the state having recourse to arms in order to defend itself legitimately or not, decides in principle, according to existing law, the question whether the war is one of aggression or not.

The position of the Covenant of the League of Nations with regard to the

jus belli ac pacis is therefore vague. The same is true of the manner in which the procedure for settling international disputes has been regulated. Only the attempt at pacific settlement is made obligatory. It is left to the parties to invoke arbitral jurisdiction or mediation. In principle, there is no obligation to invoke arbitration even in juridical questions. The parties may, unless special obligations render the appeal to arbitration necessary, submit the dispute to a mediator, above all to the Council of the League of Nations. But the opinion of the latter is in no way obligatory, not even when by a unanimously adopted opinion war is prohibited against the state which has conformed to the conclusions of the Council.

In case a member resorts to war contrary to the obligations stipulated by Articles 12, 13 and 15, Article 16 of the Covenant provides for an execution conducted by the League of Nations against the state violating the law. The question whether a war is one prohibited by the Covenant and whether the measures provided by Article 16 should be applied may be decided separately by each state belonging to the League. There is no international instance to decide who the aggressor is. The Council has no other function than to draw up an opinion on this question. But the states belonging to the League are not bound by the opinions of the Council. Yet the opinion of the Council will have considerable moral weight if all the states represented therein, with the exception of the two parties to the dispute, have approved that opinion.

A much discussed problem is whether Article 16 contains the obligation for members of the League to take up arms in the event of a forbidden war of aggression. In the opinion of the writer this question must be answered in the affirmative. Paragraph 2 of Article 16 instructs the Council to propose to the interested governments what forces they shall place at the disposal of the League for an executive action. This clause implies that the members are obliged to take part in the measures of execution. This interpretation, which is not adopted by the American note of June 23, 1928, concerning the multilateral treaty against war, is confirmed by the very genesis of the Covenant. To deny that the member states are in principle held to participate in an executive action is to deprive the Covenant of one of its basic supports. Undoubtedly it must be recognized that in special cases a state may call attention to its special situation and restrict the military aid which it owes the League of Nations for military execution.

The economic and military measures taken against a government which has started a forbidden war should not be merely a sort of guarantee for the attacked state. They should at the same time assure the punishment of the aggressor. This conception is quite justified. The proof thereof is that Article 16, paragraph 4, provides for the exclusion of a member from the League—a measure which should above all be interpreted as a punishment. If this is so, then Article 16, in its other elements, is based also on the idea of a crime to be punished. It should no doubt be considered that economic

boycott and war of execution must, by triumphing over the aggressor, merely assure his punishment. They are not a punishment in themselves. If the latter were the case, the gravest objections would have to be raised against this conception, because of the dreadful consequences which the measures may have for the inhabitants of the aggressor state who, for the most part, are innocent of the war. In any case, if the sanctions at the same time entail the punishment of the aggressor, it may be concluded that the Covenant of the League of Nations makes a crime of the forbidden aggressive war. This point of view has been maintained, for example, in the First Commission of the Sixth Assembly of the League of Nations by Motta (Switzerland) and Osusky (Czechoslovakia).[1]

These questions and many others have not been settled definitively by the Covenant. Article 16 belongs to those articles of the Covenant which have been revised with particular care and which permit broad, almost too broad interpretation. This fact explains the numerous treaties of defensive alliance concluded since the creation of the League of Nations. Prevailing opinion has never overlooked the danger of these treaties. But by reason of the deficiency of Article 16, such opinion does not regard their conclusion as a violation of the Covenant.

Hence the Covenant is very imperfect respecting the problem of outlawing war. The same is true of its methods for the pacific settlement of disputes and of the sanctions. But it should not be forgotten that these clauses are to the highest degree susceptible of change by evolution. They are part of the constitution of a League of Nations whose principal object is to consolidate the pacific collaboration of the nations and whose Article 26 provides in advance for modifications of the Covenant. We must compare this state of affairs with the laws existing before its inception, and we must agree that very considerable progress has been achieved, since by virtue of Article 12 of the Covenant every dispute must in future be submitted to a pacific settlement, and since by virtue of Articles 13 and 15 a certain number of wars of aggression are prohibited in any case. The value of these clauses is reinforced not only by the obligatory sanctions to which Article 16 binds the members of the League, but also by the full powers which Article 11 accords to the Council. The latter may take any proper measures for safeguarding effectively international peace. There should be added the rights which the League of Nations possesses by virtue of Article 17 with regard to non-member states, rights which are assuredly contestable with respect to their legitimacy. Nor should we forget the guarantee of territorial integrity in the face of every attack from without, provided for in Article 10. And the significance of Article 11 of the Covenant can hardly be overesti-

[1] *Actes de la VI^e Assemblée. Procès-verbaux de la Première Commission* (Geneva, 1925), pp. 28, 29. This point of view was shared by a committee of jurists constituted by the League to examine the guarantee plan of Lord Robert Cecil. *Procès-verbaux de la Troisième Commission* (Geneva, 1923), p. 209. Cf. also Lange (Norway), *op. cit.*, p. 84.

mated. This article can be perfected by giving the Council ever more effective powers, making it possible to deprive the various states who are members of the League of Nations of the *jus belli ac pacis*. It can be done without revising Articles 12 ff. Perhaps, too, the power of protecting the vital interests of its members can be transferred to the League. As we shall see later, the League of Nations has but lately recognized the profound meaning of Article 11, and this thanks to the excellent report of M. de Brouckère. During the first years of its history it emphasized Article 16 and perhaps stressed too strongly the importance of this article for peace.

Accordingly the clauses in the Covenant which are directed toward the outlawry of war should not be disregarded. Of course they signify only a beginning. But the League of Nations has only a brief history to look back to, and this history has already proved that the clauses in question are capable of evolution and transformation.

§ 2. The Efforts for the Further Development of the Covenant (1920–1923)

During the first period following the foundation of the League of Nations no meritorious efforts were made to enlarge the clauses contained in the Covenant respecting the interdiction of war, the procedure in settling disputes, and the system of sanctions. However, at that very time various attempts were made to develop the various articles of the Covenant. In 1921 a commission created by the Council of the League of Nations dealt exclusively with modifications to be made in the Covenant. In the First Assembly of the League, in 1920, the Permanent Court of International Justice at The Hague was established. But that signified only the execution of an obligation already contained in Article 14 of the Covenant. Here the problem of the outlawry of war was touched but indirectly, for recourse to the Permanent Court of International Justice was not regarded as obligatory even for juridical questions. But from that moment it was provided that the members of the League of Nations could submit by a special protocol to the jurisdiction of the Permanent Court for all or for certain questions of law. Of this possibility quite a number of members have since availed themselves.

In the First Assembly of the League of Nations an Argentine motion asked that the jurisdiction of the Permanent Court be made obligatory for all disputes not touching the political constitutions of the members of the League. It was rejected. Norway and Sweden sought to deprive the mediatory procedure of the League of Nations of its political aspects by the creation of permanent commissions of mediation. As they were formulated, these proposals were adopted neither by the First nor by the Second Assembly. But in the Third Assembly the conclusion of mediation treaties was recommended. At the same time model rules were drawn up for facultative

commissions of mediation. The valuable resolutions of the Second Assembly on the question of sanctions contained, in the main, rules of execution but not of modification of principle as regards Article 16.

All the partial results that have been attained or aimed at up to the time of the Geneva Protocol looking toward the outlawry of war were in the nature of efforts to solve the problem of security. It is worth noting that the whole series of political agreements and defensive treaties indirectly favored the idea of the outlawry of war by establishing the principle of obligatory arbitration. We may cite as examples Article 17 of the political agreement between the Federal Republic of Austria and the Republic of Czechoslovakia of December 16, 1921; Article 6 of the political agreement between Estonia, Finland, Latvia and Poland of March 17, 1922; Article 1 of the agreement relative to arbitration between Austria and Hungary of April 10, 1923; Article 6 of the treaty of defensive alliance between Estonia and Latvia of November 1, 1923; and Article 6 of the treaty of alliance and friendship between France and Czechoslovakia of January 25, 1924. Far-reaching arbitration clauses were incorporated in these treaties of alliance, thus realizing a proposal presented to the states by the World Peace Congress of Hamburg (1897) upon motion of the French captain Gaston Moch. But it must also be stated that most of the defensive treaties of this time do not contain an arbitration clause. We may mention in particular those concluded between the powers of the Little Entente, the political agreements of Poland with France and Rumania, and those of Italy with the Serb-Croat-Slovene State and Czechoslovakia. Similarly the movement in favor of permanent treaties of arbitration began only after the Protocol of Geneva.

In this way the legal principles of the League of Nations have been extended in the direction of outlawing war. On the whole this extension is not of great importance. Over and above it there was a more important attempt made along the same lines during the first stages of the development of the League of Nations. In 1923 the celebrated draft of a treaty for mutual assistance evolved by Lord Robert Cecil was discussed. On that occasion the principle of the outlawry of all aggressive wars was for the first time established in the League of Nations. It is indeed worthy of note that at that time and again in the years to follow the desire was expressed to extend the interdiction of war contained in the Covenant, particularly in connection with the problems of security and disarmament. That is not a mere coincidence, for the problems are closely connected. Whenever an effort was made to execute Article 8 of the Covenant it was clearly realized that the best way of attaining the goal was first to guarantee the states a more substantial protection against all aggression. It was seen that this guarantee can best be obtained by the interdiction at least of aggressive war, by perfecting the system of arbitration, and finally by developing the right of sanction.

Undoubtedly Lord Robert Cecil, in submitting his plan to the mixed

disarmament commission for the first time in July, 1922, looked only for an improvement of the right of sanction foreseen by the Covenant. He hoped to establish a general convention whereby all the interested powers would mutually promise immediate and effective aid in case of aggressive war. This treaty was to be supplemented by special guaranty pacts in favor of those states which, because of their geographical location or for some other reason, seemed to be in special danger. Lord Robert Cecil provided for mutual military support of the contracting parties to the guaranty pact even in case of a war of aggression not forbidden by the Covenant. But in establishing his plans he had not foreseen the extension of the obligations resulting from Articles 12–15 of the Covenant. The mixed disarmament commission to which the plan of Lord Robert Cecil was submitted for examination recognized the great difficulties which might arise if sanctions were permitted with regard to states which had become guilty of no infraction of the Covenant. The sub-committee of the mixed disarmament commission which met at London in May, 1923, proposed that there be affixed to the guaranty pact a preamble as follows: "The High Contracting Parties, resolved to abstain from all aggression against each other . . ." The plenary assembly of the mixed commission shared this view and decided to give that clause a greater importance by introducing it not in the preamble but as Article 1 in the draft. It read: "The High Contracting Parties, affirming that aggressive war is an international crime, undertake the solemn engagement not to make themselves guilty of this crime against any other nation."[1]

At the time of the discussions of the Third Commission of the Fourth Assembly of the League of Nations (1923) on the draft of Lord Robert Cecil, Poland proposed that this clause be inserted in the preamble so as to render the latter as important as possible.[2] But this proposal was opposed by Jouhaux, the representative of the French proletariat. Jouhaux showed that it was more than a question of principle. It is, he stated, an obligation which should be incorporated in a special article of the treaty; this conviction is shared not only by the majority of the mixed commission, but also by the working class throughout the world. We must take into account, he said, the moral influence which a treaty of this kind will exercise upon the opinion of the world.[3] Lord Robert Cecil supported this view.[4] Then the Polish representative declared that he would not insist upon his amendment.[5] Before Article 1, slightly modified by a British motion, was adopted in the first reading, the Japanese representative Sugimura asked again whether by aggressive war he was to understand also the possibility of war which Article 15, paragraph 7, of the Covenant left open. To this Lord Robert Cecil replied that the object of the treaty was to protect the states against every

[1] *Actes de la IV^e Assemblée. Procès-verbaux de la Troisième Commission* (Geneva, 1923), p. 18.
[2] *Idem*, p. 17. [3] *Idem*, p. 19. [4] *Idem*, p. 22. [5] *Idem*, p. 22.

type of aggressive war.[1] In the second reading this version of Article 1 was again adhered to.[2] But meanwhile a committee of jurists formed by the Council had proposed to denounce as a crime and to declare prohibited only a war of aggression undertaken in violation of the Covenant.[3]

At the time of the guaranty pact neither the mixed disarmament commission nor the Fourth Assembly wished to attempt a perfection of the procedure for the pacific settlement of disputes. They underestimated the importance of an obligatory procedure for the parties applicable to every case, as well as the difficulties which may arise from the fact that although doubtless forbidding war by going beyond the text of the Covenant, this procedure does not impose upon the parties the obligation of definitely settling the dispute in such a case through a superior instance. At any rate the Fourth Assembly realized that the interdiction of aggressive war, without a simultaneous development of the arbitral procedure, would give a free hand to those states which might for instance refuse to carry out the stipulations of the Council even though they had been adopted unanimously. For that reason the following idea was admitted. A war is not a war of aggression when it is undertaken by a state which has accepted the unanimous recommendation of the Council or the judgment of an arbitral tribunal, the war being against a state which has not accepted such recommendation or judgment. But to this the proviso was attached that the aggressor shall not have violated either the political independence or the territorial integrity of its opponent.[4] This peculiar compromise can be understood only if we remember that it was without doubt the intention at that time to prohibit aggressive war but at the same time to avoid as far as possible a further development of the provisions of the Covenant.

It is no less significant that as early as 1923 the League of Nations had reached the conviction that without a revision of Articles 12 *et seg.* of the Pact, or at least without the interdiction of aggressive war, the security of the states could not be guaranteed. The attempts which the League of Nations made later to outlaw war and to declare it criminal, adhered to the thesis which the mixed disarmament commission established at the time of the discussions on the draft of Lord Robert Cecil.

The debates concerning the guaranty project naturally dealt also with the definition of the aggressor. The reply to the question was to be left, in the individual instances, to the Council of the League of Nations, which was to establish the aggressor within a period of four days. Before the Fourth Assembly took this stand, the problem had already been treated in a very profound way, perhaps even more thoroughly than at any other time, by several organs of the League of Nations.

However, the guaranty plan of Lord Robert Cecil failed. It was adopted

[1] *Actes de la IV^e Assemblée. Procès-verbaux de la Troisième Commission* (Geneva, 1923), p. 22.
[2] *Idem*, p. 83. [3] *Idem*, p. 209. [4] *Idem*, p. 84.

by only eighteen members of the League of Nations. Great Britain, the United States, Russia, Germany and other powers declared that for various reasons it could not be regarded as an admissible basis of discussion. When the Fifth Assembly began its labors and, under the leadership of Herriot and MacDonald, began to work out the Protocol of Geneva, several of the basic ideas of the draft of Lord Robert Cecil were without doubt taken up again. But as a whole the Protocol, in comparison with the guaranty pact, contains such important modifications that it could not be called a mere development of the guaranty pact.

Among the innovations which the Protocol of Geneva contained in contrast to the guaranty pact was a definition of the aggressor taken from the draft of a private American committee. For the first time in the recent history of the movement for the outlawry of war the efforts of the League of Nations and those of the Americans were joined and directed in common toward the goal of universal peace.

The great desideratum, outlawry of war, which the League of Nations had treated only secondarily, as a corollary of the problem of security, has in America been for a long time the starting point of a great movement which was destined to exercise an increasing influence. It is essential that we study the character of this movement closely and that we reveal those traits in it which distinguish it from the ideas prevalent in the League of Nations. It will then be seen how the two tendencies represented by Washington and Geneva subsequently developed along parallel lines and influenced as well as advanced each other despite all differences.

III. THE AMERICAN MOVEMENT TO OUTLAW WAR[1]

§ 1. Its Origin and Basic Ideas

[1] Cf. the following literature: Florence E. Allen, "If War were a Crime," Survey Graphic, August 1925; William E. Borah, "Outlawry of War," Excerpt from speech in the Senate of the United States, December 29, 1922 (Washington, 1923, Government Printing Office); William E. Borah, "Public Opinion Outlaws War," The Independent, September 13, 1924; William E. Borah, "Outlawry of War," A speech before the Philadelphia Forum, December 17, 1924, The Christian Century, January 1, 1925; William E. Borah, Speech in the Senate of the United States, Friday, January 22, 1926 (Washington, 1926, Government Printing Office); William E. Borah, Debate of William E. Borah and others in the Senate of the United States, Wednesday, January 27, 1926 (Washington, 1926, Government Printing Office); Austen Chamberlain, "The Search for Security," The World, December 3, 1927; Wolf v. Dewall, *Der Kampf um den Frieden* (Frankfurt a. M., 1929), pp. 197 ff.; John Dewey, "Why not Outlawry of War?" The New Republic, March 21, 1923; John Dewey, "If War were Outlawed," The New Republic, April 25, 1923; John Dewey, "Outlawry of War; What it is and is not. A reply to Walter Lippmann," The New Republic, October 3 and 24, 1923; Lynn J. Frazier, Remarks in the Senate of the United States, February 21, 1928. Article from the Contemporary Review for December 1927 (Government Printing Office, 1928); R. Froger-Doudemont, *Qu'est-ce que la guerre hors la loi?* (Paris, 1928); William Hard, "The Outlawry of War," The Annals of the American Academy of Political and Social Science (Philadelphia, July 1925), Publication Nr. 1911; John Haynes Holmes, "Outlawry of War—A Policy of Abolition," The World Tomorrow, November 1926; C. Howard-Ellis, The Origin, Structure and Working of the League of Nations (London, 1928), p. 328; Krais, "*Die Idee der Kriegsächtung in Amerika*," *Friedenswarte* (1925), p. 301; Philip Kerr and Lionel Curtis, The Prevention of War (New Haven, 1923); S. O. Levinson, "Can

The American movement for the outlawry of war goes back in its present form to the efforts of the American lawyer Levinson, who, in an article published on March 9, 1918, in *The New Republic*, was the first to describe the outlawry of war as the principal objective in the transformation of international relations. With great zeal and untiring energy Levinson has since devoted himself to the propagation of this idea. He has developed it under the direct impression of the negotiations at Versailles and has himself worked out the draft of a treaty for the outlawry of war.[1] He has succeeded, too, in winning over to his cause eminent figures in American life, particularly Senator Borah and the editor of the important religious journal the *Christian Century*, Charles Clayton Morrison. No less than three times, namely on February 14, 1923,[2] on December 9, 1926,[3] and on December 12, 1927,[4] Borah has presented to the American Senate a motion in favor of the outlawry of war. Later Senator Frazier followed his example. On April 23, 1926, he proposed on behalf of the Women's Peace Union an amendment to the Constitution in favor of the outlawry of war.[5] A special organization,

War be Outlawed?" The Forum, January 1924; S. O. Levinson, Letter to Mr. J. C. Garnett, March 11, 1924; S. O. Levinson, "The Draft Treaty and the Outlawry of War," The New Republic, August 27, 1924; S. O. Levinson, "Can Peace be 'Enforced'? A Study of International Sanctions," The Christian Century, January 8, 1925; S. O. Levinson, "The Prevention of War." The Yale Daily News, April 21, 1925, S. O. Levinson, Jesse Siddall Reeves, "Can War be Outlawed?" A debate. I. "A Law to End War" (Levinson), II. "A Phrase to End War" (Reeves), The Forum, January 1924; S. O. Levinson, "Abolishing the Institution of War," The Christian Century (March 22, 1928), p. 377; Walter Lippmann, "The Outlawry of War," The Atlantic Monthly, August 1923; Charles Clayton Morrison, The Outlawry of War. A Constructive Policy for World Peace (Chicago, 1927); Charles Clayton Morrison, "Aggressive War—A Fiction," The Christian Century (February 23, 1928), p. 259; Charles Clayton Morrison, "Excommunication and Outlawry," American Committee for the Outlawry of War, March 6, 1924; Melvin Verne Oggel, "Outlaw War. A Message to the Christian Leaders in America." Chicago, The American Committee for the Outlawry of War; Melvin Verne Oggel, "Confessions of a Pro-Leaguer." Chicago, The American Committee for the Outlawry of War; Nicolas Politis, *Les nouvelles Tendances du Drout international* (Paris, 1927), p. 113; Eddy Sherwood, The Abolition of War (New York, 1924); Jeremiah Smith, "The Preservation of Peace." Oration of the Phi Beta Kappa Society of Harvard University, June 24, 1927; Helene Stöcker, "*Das Problem der Kriegsachtung*," *Friedenswarte* 1926, p. 144; Walter Walsh, "The Outlawry of War." London, April 24, 1927. The Free Religious Movement towards World-Religion and World-Brotherhood (Free Religious Addresses, No. 284); Hans Wehberg, "*Senator Borah und der Verteidigungskrieg*," *Friedenswarte* 1926, p. 222; Quincy Wright, "Changes in the Conception of War," American Journal of International Law, 1924, p. 755; Quincy Wright, "The Outlawry of War," American Journal of International Law, 1925, p. 76; "How can War be Outlawed?" Christian Century, December 11, 1924; "Plan for the Outlawry of War," Christian Century, July 17, 1924; "The Outlawry of War," The New York World, March 18, 1923; "Draft of a proposed general treaty for the pacific settlement of international disputes, together with an analysis of all the arbitrations to which the United States has been a party," The American Foundation, Inc., May 30, 1927, No. 2; *Friedenswarte*, 1923, pp. 97, 309, 406; 1924, pp. 165, 185, 211; 1926, p. 394; 1927, p. 47.

[1] Cf. Morrison, The Outlawry of War (Chicago, 1927), pp. 61 ff.

[2] 67th Congress, 4th Session, Sen. Res. 441.

[3] 69th Congress, 2d Session, Sen. Res. 287.

[4] 70th Congress, 1st Session, Sen. Res. 45. In the resolution of December 12, 1927, the problem of legitimate defense is not treated. This fact does not signify a modification of the two former resolutions.

[5] 70th Congress, 1st Session, Sen. Joint Res. 100. Cf. also Hearing before a subcommittee of the committee on the judiciary United States Senate. 69th Congress, 2d Session on Sen. Joint Res. 100; a joint resolution proposing an amendment to the Constitution of the United States relative to war, January 22, 1927 (Washington, 1927).

the American Committee for the Outlawry of War, which has its own representation in Europe, has dedicated itself to propaganda for the outlawry of war, so that this problem is now the prime factor in the American peace movement. Without agreeing in all details, most of the American peace societies have adopted as one of their planks the outlawry of war.

We may go still further by stating that the fundamental idea of the outlawry of war became at an early date an essential element of official American policy. In an address of November 12, 1921, President Harding declared that all nations which have a sense of their responsibility would like to see war outlawed.[1] And President Coolidge, in a message to Congress of December 3, 1924, made the more definite statement that:[2]

> Much interest has of late been manifested in this country in the discussion of various proposals to outlaw aggressive war. I look with great sympathy upon the examination of this subject. It is in harmony with the traditional policy of our country, which is against aggressive war and for the maintenance of permanent and honorable peace. While, as I have said, we must safeguard our liberty to deal according to our own judgment with our domestic policies, we cannot fail to view with sympathetic interest all progress to this desired end or carefully to study the measures that may be proposed to attain it.

The American movement for the outlawry of war considers it an error to try to assure peace by a political organization of the world, by treaties of alliance, and by sanctions. In place of this system it would proscribe war as an institution and create an international court of justice which would render justice on the basis of an international code, without any check but that of the public opinion of the world. The international relations of the peoples should be based upon trust and confidence, and not upon force. The goal is expected to be attained not by progressive evolution but by an act. One nation, preferably America, should set the example and modify the conditions of war in its constitution, with but one proviso, viz., that the other nations must follow its example.[3] As soon as war has been outlawed, if possible after a popular referendum, the principle is to be laid down in a solemn treaty. The greatest importance is attached to the condition that the outlawry of war shall be the expression of the popular will and not merely the result of a diplomatic conference.

Although in the final analysis the League of Nations owes its existence to the initiative of Wilson, although Wilson himself was considerably influenced by the ideas of the League to Enforce Peace, the protagonists of the American movement for the outlawry of war deny that the League of Nations is in accord with the American idea of an organization of states. They claim that in establishing the League of Nations, Wilson availed himself of European ideas, and that American traditions are hostile to the use of force against a state which has violated the law. To establish their thesis, they refer to the American Constitution, which denies the use of military force.

[1] Outlawry of war. Sen. Doc. 115, 67th Congress, 2d Session, p. 4.
[2] American Journal of International Law, 1925, p. 169.
[3] This condition is omitted in the resolution of Senator Frazier.

They recall that when the Constitution was framed in 1787 there was disagreement between the partizans of military force and their adversaries, which under the leadership of Madison and Hamilton ended in a victory for those who wished to base the fulfilment of the obligations of constitutional law upon confidence and trust.

Yet it would be incorrect to characterize the League of Nations as a product of European ideas pure and simple. It is rather the result of a period determined and influenced by the experiences and the mentality of the world war. In America, a country whose history is appreciably different from that of the European nations, the idea of basing international relations solely upon trust and confidence has always enjoyed special sympathy. It is sufficient to recall the ideas of Elihu Root. It is also a known fact that during the discussions at Versailles Mr. Lansing, the Secretary of State under Wilson, expressed himself against military sanctions. In the great struggle which ensued in the United States in 1919 and 1920 on the subject of entrance into the League of Nations, the American aversion to sanctions became even greater. The experiences of the World War served to bring this about.

Thus the American movement in favor of the outlawry of war, in consciously opposing the League of Nations and in giving America a new program of peace destined to replace that of Wilson, exercised a profound influence upon public opinion in the United States.

§ 2. Its Desiderata in Detail

A. Renunciation of warlike force

We shall now study in more detail the program of the American movement for the outlawry of war.[1] It must be stated first of all that its partizans demand a definite renunciation of war considered as an instrument, and that they refuse to accept partial results. War must disappear in all its forms. It should no longer be a legally authorized institution. In future it is not to be considered either for the settlement of international disputes or for the execution of decisions and judgments pronounced by international tribunals. If another war should break out, it should in any case not be considered as sanctioned by international law, but it should be regarded as in contradiction to the rules of such law, on the same plane with piracy, slavery, servitude and murder. It is a crime. The resolution of Senator Borah goes even further. It demands that international war schemers, those who campaign for war, and those who derive benefits therefrom, shall in each country be brought before a court of justice.

Outlawing only aggressive war is not deemed sufficient for the abolition of the institution of war. At first, no doubt, Levinson wished to proscribe only aggressive war. But in 1920 the celebrated jurist John Bassett

[1] Cf. especially Morrison, The Outlawry of War (Chicago, 1927).

Moore declared[1] that if Levinson would outlaw war he should make no distinction between defensive and offensive war. The right of self-defense, he stated, goes without saying. But to defend oneself is not tantamount to making war. This idea has since been adopted by the movement. It discards every distinction between permissible and prohibited wars. As for wars of aggression in particular, it holds that they do not exist in the strict sense of the term and that at any rate it can never be established in full certainty who the aggressor is. Morrison[2] insists, for example, on the fact that the nation which declares the war is not necessarily the aggressor. The decisive act of attacking is not sufficient to determine the aggressor. The responsibility and the attack are ordinarily in a reciprocal relation to each other. No nation will admit that it is waging a war of aggression, for every nation affirms that it takes up arms for its defense. In analogous fashion this idea could be applied to defensive warfare. But the objections raised on the subject of determining the aggressor, when it is a question of interdicting aggressive war, suddenly disappear when defensive war is to be permitted. Of course it might be said that there is defensive war only where there has been an attack and that without determining the aggressor it is not possible to establish decisively a case of true defense. In general a case of legitimate defense is admitted without fixing more precisely the conditions upon which it depends.[3] Undoubtedly it is believed that once war is outlawed the acts justifying defensive war will disappear.

Attention should be called to the fact that a part of the American movement for the outlawry of war, that is, the part which likewise condemns defensive war, proceeds from the ideas of Tolstoi. We may mention here the Women's Peace Union.[4] But it does not represent the prevailing American opinion.

In contrast to defensive war, military sanctions of every kind are spurned by the American movement for the outlawry of war. It is curious to note that the use of sanctions is interpreted as constituting war, but that at the same time defense assured by the means of war is not regarded as war. Those who would outlaw war feel that good faith and confidence are sufficient bases for international relations after war has been outlawed. It is interesting, however, that in the final analysis they realize that sanctions are based upon good faith and confidence. According to them the adherents of the League of Nations involve themselves in a flagrant contradiction. On the one hand these adherents believe firmly that the governments would keep their word and begin a punitive war in the course of

[1] Levinson, The Draft Treaty and the Outlawry of War, The New Republic, August 27, 1924.

[2] *Op. cit.*, p. 215.

[3] Morrison, *op. cit.*, p. 206.

[4] The members of this Union pledge themselves to the following formula: "I affirm that it is my intention never to aid in or sanction war, offensive or defensive, international or civil, in any way, whether by making or handling munitions, subscribing to war loans, using my labor for the purpose of setting others free for war service, helping by money or work any relief organisation which supports or condones war."

which many innocent women and children would be killed. On the other hand the states belonging to the League of Nations distrust each other when it comes to a mutual understanding not to wage war in future. In contrast to the conception of the League of Nations, the Americans maintain that the promise given is valid only while there is no war, so that the execution of military sanctions will always be dubious. In emergencies the military conventions will always be interpreted from the point of view of the selfish interests of each individual state. The system of war is not so constituted as to be a means of carrying out international functions. The use of military sanctions, it is claimed, will easily lead to a new world war and to the destruction of the League of Nations. Simply because there have always been wars, the adherents of the League of Nations cannot imagine a world organization without military measures of constraint. But the Americans argue, once the system of outlawing war is introduced, the problem will take on a different aspect.[1]

In presenting considerations of this kind, one criticizes, of course, not only the League of Nations and the Geneva Protocol but also the Locarno Pact. In the League of Nations a political and military pact is seen. What is desired is an organization of the world based solely upon law. It is insisted that the American adherents of the outlawry movement, while scouting America's entrance into the League of Nations, are not hostile to the League itself. They condemn only war and the system of war. They will cease opposing the entrance of the United States into the League as soon as the League is ready to outlaw war and to renounce military sanctions.[2] When the Pact of Locarno was signed they replied that the parties thereto had not outlawed war. For war cannot be outlawed in part. Only when Germany, France and the others renounce war with respect to all states will the recourse to war have been definitely abandoned by them.[3]

The outlawry of war has so thoroughly become the basic plank of the American program that the limitation of armaments is accorded only a secondary place, especially from the financial point of view. It is asserted that the outlawry of war will in itself bring disarmament, while under the present system of war the demon of distrust and fear obstructs disarmament.[4]

B. The World Court and the codification of international law

But the movement for the outlawry of war does not content itself with demanding the outlawry of war. It is convinced that the interdiction of war should be supplemented by an obligatory procedure looking toward the pacific settlement of international disputes. Consequently the Americans desire the establishment of an international court of justice which shall judge disputes between nations just as the Supreme Court of the United States

[1] Morrison, *op. cit.*, p. 175.
[2] *Idem*, pp. 113, 121, 231.
[3] *Idem*, p. 54.
[4] *Idem*, pp. 96, 225.

judges disputes between the individual states of the Union. This court of justice would be the superior organ of the community of nations. It would stand above all political institutions and would even pronounce judgment by default.[1]

The court of justice would render justice on the basis of a code to be framed as soon as possible by a conference of the states. It is felt that the time is already ripe for a codification of this kind and that this task could be accomplished within a period of from two to five years,[2] the understanding being that only a minimum of international political principles would be laid down. It would not be necessary to codify immediately the whole body of international law without exception. Decisive importance would be attached to the establishment of those principles whose existence would make it possible for the international court of justice to begin its labors. The codification should not be undertaken for the sake of codification itself but for the maintenance of peace. Such a code should be complete enough to inspire the nations with confidence in the decisions of the court of justice and to permit the court to exercise real juridical power. The code should not be rigid and unchangeable. From time to time it should be revised and supplemented.[3]

Concerning the question whether the law of war is to be codified there is disagreement. The orthodox tendency of the movement rejects any regulation of the laws and usages of war,[4] while Senator Borah demands their codification.[5]

As for the competency of the international court of justice, it is to be limited to the decision on questions regulated in the code or on questions concerning the interpretation of the treaties. The difficulties of another nature would be settled by good offices or by mediation. The idea of submitting all disputes without exception to arbitration is not considered possible of realization. Tariff disputes, questions of immigration, the Monroe Doctrine, the prohibition of alcohol, the interallied debts are all problems which do not come under the jurisdiction of the international court of justice.[6] It is clear then that the system of the outlawry of war is not without its gaps. Once put into practise it would still leave much to be done by conferences and mediatory organs.[7] For settling the difficulties which would not fall into the province of the court, complete reliance is placed in the use of diplomatic methods. For in this system these disputes would assume quite a different character. It is claimed, for instance, that

[1] Morrison, *op. cit.*, p. 135; Hudson, The Permanent Court of International Justice and the Question of American Participation (Cambridge, 1925), p. 219.

[2] Levinson believes that the framing of a code would take two years, while the late Senator Knox believed that it would require five years. Sen. Doc. No. 115, 67th Congress, 2d Session, p. 8.

[3] Morrison, *op. cit.*, p. 155. [4] *Idem*, p. 162.

[5] Cf. his resolution introduced in the Senate on February 21, 1928, concerning the codification of the law of maritime war, Foreign Policy Association Information Service, New York, IV, No. 1.

[6] Morrison, *op. cit.*, p. 67. [7] *Idem*, pp. 126, 129.

the conflict between the United States and Nicaragua is possible only because the system of war is still maintained and because Nicaragua forms a part of the American system of defense.[1]

The decisions of the court would be carried out on the basis of good faith and confidence. The use of military sanctions for the execution of judgments pronounced by international tribunals would be discarded. Only the respect of all civilized nations for the decisions of the court of justice, based upon fair public investigations and upon impartial judgment, and in the second place the sovereign power of enlightened public opinion would guarantee the execution of decisions rendered, as Senator Borah states in his resolution.

One could reply to the adherents of this movement that the Permanent Court of International Justice, established by the League of Nations, already exists at The Hague. But the adherents of the movement say that this court does not measure up to their ideal, that it is subordinated to the League of Nations, and that it is therefore not above all political institutions. They add that except for certain special cases it lacks obligatory competency. In the final analysis it is only a court of arbitration. In a conference which took place in New York on July 15, 1925, between the adherents of the idea that the United States should enter the Permanent Court of International Justice and the champions of the outlawry of war, Morrison, Levinson and others adhered to a program of union whereby they agree to support the entrance of the United States into that court on condition that the United States shall be able to withdraw if the program of the outlawry of war has not been accepted by the powers within a period of two years.[2] But it seems that this agreement was only temporary, and that it did not extend to all the leaders of the movement for the outlawry of war. It is generally known that Senator Borah has to this day remained an adversary of the entrance of the United States into the Permanent Court of International Justice.

It is precisely the attitude toward this last question which shows how doctrinaire the movement is, and how unbending are its adherents even in tactical questions. They demand everything or nothing. They refuse to attain their goal by successive stages. They do not show the necessary appreciation of the splendid forces represented by the League of Nations and of the peculiar situation in Europe. Their criticism of the Permanent Court of International Justice is not only unfair; it is also based in part upon an insufficient knowledge of its organization. The movement in favor of the outlawry of war, which to a certain extent has a marked religious character and is supported by religious organizations in the United States, partakes more or less of the fanaticism inherent in every young religious community.

[1] Morrison, *op. cit.*, p. 193.
[2] Unity, Chicago, 27th July, 1925; *Friedenswarte*, 1925, p. 301.

§ 3. The Plan of the American Committee of 1924

The American movement has therefore proved alien to the whole world of ideas in which the League of Nations lives. Hence it is important that a certain number of prominent Americans who are on the whole sympathetic to the movement for the outlawry of war but have not rigidly accepted every plank of the program, attempted at an early date to establish bonds between Geneva and Washington and to bring about genuine collaboration between the intellectual forces which on both sides of the ocean are trying to overcome war by organizing the world. Above all, the efforts of Professor Shotwell deserve praise. In the spring of 1924, together with several other Americans, among them General Bliss and the well-known authority in international law, David Hunter Miller, he worked out a private plan for the outlawry of offensive war. This plan is remarkable from two points of view. In the first place it proposes a new definition of the aggressor. In the second place it tries to reconcile the position of the League of Nations and that of public opinion in America with regard to sanctions. Sanctions are to be tolerated but not admitted as obligatory.[1] Defensive treaties between states belonging to the League of Nations are not prohibited but expressly provided. But they must be approved by the Council of the League of Nations.

The plan, which assumed a new form before the Fifth Assembly of the League of Nations, prohibited every aggression, every preparation with a view to attack, and in particular every mobilization. At the request of one of the parties the question whether an act of this kind had been committed was to be decided by the League of Nations. A party refusing to submit in such a case to the judgment of the Permanent Court of International Justice was to be considered the aggressor.

No doubt the fundamental idea of the plan was that whoever refuses arbitration is to be considered the aggressor. But this idea was here developed only imperfectly. The obligation of all Powers to submit all disputes to the Permanent Court of International Justice or to some other court had been left out of the question. In other words, war was outlawed without providing for pacific settlement of all disputes. To the Permanent Court of International Justice there were submitted only such disputes as concerned the question whether the obligations of the pact prohibiting all acts of aggression had been violated. Nevertheless the definition of the American committee, by virtue of its fundamental principle, has been of great importance for the subsequent development of the laws of the League of

[1] Cf. *Arbitrage, Sécurité et Réduction des Armements, Extraits des débats de la V^e Assemblée* (Geneva, 1924), p. 261; *Projet de Traité de désarmement et de sécurité présenté, avec des commentaires, par un groupe américain, Société des Nations*, C. 339, 1924, IX, Geneva, July 7, 1924; International Conciliation, Nos. 201, 205 and 208; Mendelssohn Bartholdy, *Die Gesellschaft*, (Berlin, 1924), p. 531; Wolfgang Schwarz, *"Der amerikanische Friedensvorsohlag in Genf," Europäische Gespräche*, 1924, No. 5, p. 441; Shotwell, *"Amerika und das Genfer Protokoll," Europaische Gesprache*, 1924, No. 6, p. 517.

Nations. It has facilitated to a considerable extent the further development of the Protocol of Geneva. As inadequate as it may seem seven years after its publication, as naïve as its formula "whoever refuses arbitration is to be considered the aggressor" may sound, yet this plan has fulfilled its great historical mission. It helped toward the real though temporary success of the important work of the Fifth Assembly. It has contributed toward the acceptance, for the first time by an international conference, of a plan based upon the principles of the outlawry of war and of almost unlimited arbitration.

The American plan was submitted on June 16, 1924, to the governments represented in the Council of the League of Nations. Before and during the Fifth Assembly it was studied with the greatest interest.

IV. THE GENEVA PROTOCOL

§ 1. The Interdiction of Offensive Warfare

Despite the important impulse given by the American committee, the Fifth Assembly would not have launched the Geneva Protocol, had not the idea of establishing a general guaranty pact been greatly assisted by the personal intervention of Herriot and MacDonald. Though finding a place in the pact of Lord Robert Cecil, the idea of the outlawry of war had not been adopted by public opinion outside of the United States in the autumn of 1923. No doubt people were slowly beginning to become familiar with the possibility of outlawing all offensive warfare. But not many believed that the plan could be realized in a short time. When shortly before the Fifth Assembly the writer asked a number of prominent German jurists and politicians whether they thought the time was ripe for declaring all offensive warfare criminal, some replied in the negative. Among them were Count Bernstorff, the head of the German Union for the League of Nations, and the pacifist general von Deimling.[1] The then prevailing state of mind is shown by the addresses which were delivered at the opening of the Fifth Assembly. The Dutch delegate van Karnebeek asked whether it was necessary to extend the obligations contained in the Covenant of the League of Nations, since Articles 12–16 of the Covenant, loyally carried out, would be sufficient to prevent the outbreak of any war whatsoever.[2]

The result of the work of the Fifth Assembly [3] seems quite remarkable to anyone bearing in mind that public opinion had not yet been prepared. For the first time there was signed in the League of Nations a treaty which provided for the outlawry of aggressive warfare. This signified an important advance over the Covenant of the League of Nations.

The interdiction of aggressive warfare is, according to the report of

[1] *Friedenswarte*, 1924, pp. 206, 211.
[2] *Actes de la V^e Assemblée. Séances Plenières* (Geneva, 1924), p. 50.
[3] Baker, The Geneva Protocol (London, 1925); Miller, The Geneva Protocol (New York), 1925; and Wehberg, *Le Protocol de Genève, Académie de Droit International, Recueil des Cours*, VII (Paris, 1926), 5.

Politis-Benès, "the general principle of the Protocol." It was contained in the preamble and in Article 2 of the Protocol. In the preamble it was stated that "offensive warfare constitutes an infraction of solidarity and an international crime." In Article 2 the signatory states agree "that in no case shall they have recourse to war, either among themselves or against any state which in a given case would accept all the above defined obligations." However, two exceptions to this principle are admitted. In the first place defensive warfare is not only admitted, but the report even insists that the state counting upon the aid of the international community "must begin by defending itself with its own means." Moreover the military measures taken in accordance with Article 16 and Article 13, paragraph 4 of the Covenant, or in accordance with the corresponding stipulations of the Protocol, namely to go to the aid of an attacked state or to execute an arbitral award which one state refuses to obey, are declared admissible. As the Politis-Benès report specially remarks, there existed the desire to recognize frankly that the principle of the outlawry of war had not been fully realized, rather than to conceal this fact and thus to try to save the public a disappointment.

§ 2. The System of Arbitration

Realizing that it would be much easier to bring about the interdiction of offensive warfare if the pacific settlement of all international disputes were made possible, the Protocol of Geneva created a practically complete system of arbitration with almost no reservations. The success which the Protocol of Geneva achieved on this score is all the more surprising since in trying to solve the problem of arbitration it had no preliminary work to fall back upon. In particular, at the time of the discussions of the guaranty pact of Lord Robert Cecil, the creation of a system of arbitration which could be introduced without difficulty into the system of the League of Nations had been overlooked. The importance of this question was then not realized.

The procedure laid down by the Covenant for the pacific settlement of international disputes was considerably extended by the Protocol of Geneva. For disputes of a juridical nature the Permanent Court of International Justice was named as the obligatory court of judicature. Article 3 of the Protocol imposed upon the signatory states the absolute obligation of adhering to the special protocol of the Court, admitting all sorts of reservations, to be sure. Other conflicts must be submitted according to the special procedure of Article 4 of the Protocol, in which the ideas of arbitration and mediation were linked. The procedure must begin with mediation on the part of the Council. If the latter does not succeed in reconciling the parties or in provoking the appeal to arbitration, it becomes necessary, on the request of one of the parties and with the collaboration of the interested powers, to institute "obligatory arbitration of the first degree." But if neither of the parties makes this request the Council must again examine the difference and draw up a report. A unanimous report of the Council is to

have binding force. A report not unanimously adopted should make it easier for the parties to reach an amicable agreement. But if no agreement is reached, the Council must institute "an obligatory arbitration of the second degree," without the assistance of the parties. In such cases the procedure must be concluded by an award or by an agreement which binds the parties.

But the system of arbitration of the Geneva Protocol admitted reservations. In the first place, according to Article 4, No. 5, of the Protocol, a regulation which had been unanimously recommended by the Council before the Protocol came into force and had been accepted by one of the parties, was no longer to be questioned. This measure was taken without declaring a unanimous recommendation of the Council binding for the parties. In the second place, according to Article 4, No. 7, of the Protocol, such disputes were excepted from obligatory arbitration as "could arise as the result of war measures taken by one or several signatory states in accord with the Council or the Assembly." The purpose of this clause, which hardly agrees with humanitarian principles, was to refrain from furnishing arms to the aggressor state, for such arms might restrict the liberty of the belligerent states charged with executing sanctions against it.

More important than the exceptions contained in Article 4, Nos. 5 and 7, of the Protocol, were the other exceptions to the principle of unlimited arbitration. These exceptions are contained in the Protocol and also in the Politis-Benès report. First of all, Article 5, paragraph 1 of the Protocol maintains expressly the clause of Article 15, paragraph 8 of the Covenant. The disputes called "internal" are to be kept out of the system of arbitration provided by Article 4 of the Protocol. It is no mere chance that the position taken by the Protocol of Geneva agrees on the one hand with the American idea of the outlawry of war and is opposed, on the other, with the strongest resistance on the part of Japan. In the opinion of the writer, this resistance is quite justified. At the time of its creation and under the influence of the American ideas, the League of Nations declared its inability to solve a whole series of the most perplexing problems. This point of view the Protocol of Geneva wished to uphold. The Japanese resistance was at least successful in forcing the League of Nations to recognize that "internal" disputes can be examined by the Council in accordance with Article 11 of the Covenant.

The fourth exception to the principle of arbitration was not contained in the Protocol itself. It followed from the report of Politis-Benès. According to this report disputes which have as their object a demand for the revision of international treaties or which would question the existing territorial integrity of the signatory states must be excepted from obligatory arbitration. This decision implied a negative attitude toward the principle of self-determination of the nations. The brief time which remained at the disposal of the Fifth Assembly explains perhaps the inadequacy of the solution of this problem. It is however certain that a regulation of international rela-

tions based upon principles of real justice cannot thus exclude from the competency of an impartial arbitral court those questions which concern the revision of international treaties and the changes to be made in existing territorial integrity.

§ 3. The Sanctions

As regards the system of sanctions admitted by the Protocol of Geneva, the aggressor should be determined in principle by the unanimous decision of the Council. But in order to take into account as far as possible objections which arise in such cases from the required unanimity, there was established in Article 10 of the Protocol a series of principles and hypotheses by virtue of which a state may be automatically stamped the aggressor, without a special decision of the Council. In such a case the Council merely regulates the sanctions against the state violating the law. If for example a state should refuse to submit to the peaceful procedure of the Covenant or of the Protocol, and if it refused to execute the binding decision of an international tribunal, it would be declared the aggressor. To be sure, a refutation of this legal presumption was admissible, but only by unanimous decision of the Council. If, therefore, after the beginning of hostilities all the members of the Council with the exception of one were of the opinion that a state declared the aggressor should not be considered as such, the Council would nevertheless set in motion the sanctions against this state because the refutation was not based upon unanimity. We need but imagine such a difficult case as the famous controversy involving those exercising the option between Rumania and Hungary. It will then be seen what disastrous consequences Article 10 of the Protocol of Geneva may have in certain instances. It is known that the jurists are of very different opinion on the question whether Rumania was right in ignoring the judgment pronounced by the mixed Rumano-Hungarian arbitral tribunal. If under the jurisdiction of the Protocol of Geneva a war had broken out between Rumania and Hungary because of this dispute, it would have been necessary to consider Rumania the aggressor in case the members of the Council had not agreed unanimously that Rumania was right in ignoring the arbitral sentence. In view of the divergence of opinions on this point, the unanimity of the Council would have depended upon chance. At any rate it is safe to say that in such a case the juridical situation is far too complicated to make it possible to determine the aggressor without a preliminary investigation and merely upon the basis of a presumption.

In the case of an attack as provided by Article 10, paragraph 5, the Protocol of Geneva provided for immediate sanctions. These were to take place automatically, without allowing the Council to examine whether it would be preferable, at least for the time being, to employ other measures. The Protocol of Geneva did not indicate in any manner that after the beginning of hostilities an attempt at a pacific settlement might be made. For example, the Council was not given full powers to instruct the two parties

to conclude an armistice, as the German delegation had proposed to the committee of arbitration and security on February 22, 1928. A measure of this kind was provided only in case the aggressor could be determined. It was not realized that sanctions, though they cannot be avoided in certain cases, are always something terrible and constitute a great menace to the existence of the League of Nations. Thus a very dangerous importance was attached to the idea of reciprocal military aid. In this sense the Protocol of Geneva, despite its great advantages and the considerable progress which it signified over the Covenant, was still more or less a product of the period immediately following the war. As yet its authors did not realize that in order to preserve peace it was better to avoid conflicts, by virtue of Article 11 of the Covenant, than to prepare sanctions on the basis of Article 16 of the same Covenant.

§ 4. Critique of the Protocol

We cannot point out in this place the many interesting details of the Protocol of Geneva. But we must devote some attention to the part which the Protocol has played in the development of the League of Nations. The Protocol is bound to have a permanent historical value, and the Fifth Assembly will always deserve a place of honor in the annals of international relations.

The Protocol presents the advantage that it does not merely seek to regulate certain special questions but that to a certain extent it establishes a new system for the guarantee of peace, that it seeks to renew and improve in a radical manner the entire peaceful procedure foreseen by the Covenant of the League of Nations, and that it has the express purpose of making the limitation of armaments possible. But many are discouraged by the failure of the discussions in the preparatory commission of the disarmament conference, and these persons are then unfair to the League of Nations. It is overlooked that in the Fifth Assembly, at any rate, the League of Nations made an honest attempt to solve the disarmament problem, and that the states were then ready to consent to important limitations of their sovereignty in favor of the League of Nations. All offensive warfare was outlawed; a practically absolute system of arbitration was introduced; and the declaration was made that an attacked state would be supported without regard to individual interests. This is adequate proof that there are fruitful forces at work in the League of Nations, and that it requires only the initiative of several eminent statesmen to guide the will of the League to a lofty goal.

In Article 13, paragraph 2, the Protocol of Geneva permitted special alliances. Yet emphasis was placed upon the creation of guarantees of general security. The dominating idea of the Protocol is that peace should be guaranteed in the first place by a pact binding all the states. In the sequel the refusal of Great Britain to admit these general guarantees of security

beyond the obligations contained in the Covenant has turned the entire movement in the direction of special guaranty treaties. This idea was splendidly realized in the Pact of Locarno. The pact of the future is however bound to be the universal guaranty pact. If the Protocol of Geneva is given the necessary revision, if the system of sanctions is properly restricted by elimination of its exaggerations, instead of merely creating guarantees against premature sanctions, and if the Council of the League of Nations is given extended powers which will make unnecessary the use of sanctions in general, then the Protocol of Geneva, thus revised, will constitute the most effective guarantee of peace.

For meanwhile the discussions of the League of Nations on Articles 11 and 16 of the Covenant have made it clear that the chief emphasis must be placed not upon Article 16 but upon Article 11 of the Covenant. Some go even so far as to maintain that the procedure provided by Article 11 is the best preparation for the application of Article 16. The excellent report of M. de Brouckère has contributed a great deal to this result. In this we may see the beginning of a movement which will ultimately do away with the entire system of exaggerated sanctions. A future draft of a pact providing for automatic sanctions is hardly conceivable. Only in an extreme case will a state be threatened by military sanctions, and the greatest importance will be attached to an effort to exhaust all other possible means before resorting to them. Once the necessity of a regulation of this kind has been recognized by all states belonging to the League of Nations it will be possible to create a universal guaranty pact acceptable to all the states, including Great Britain.

From this point of view the question whether the Protocol is to be considered antiquated or as an ideal for the future, solves itself. If we realize that the system of automatic sanctions in the Protocol is the least successful part of a scheme of peace which is in itself grandiose, and if we admit that only a universal pact can avoid the dangers of special agreements and can guarantee the universality of peace and security, the result of the labors of the Fifth Assembly will remain a splendid model for the League of Nations in future. Then all the friends of the League will adopt the motto: Back to the Protocol of Geneva!

Aside from the idea of a universal guaranty pact, the Protocol has considerably advanced two ideas, namely the interdiction of offensive warfare and unlimited arbitration. These two ideas were much disputed in the Fifth Assembly. Up to then they had been approached with hesitation. Since then we have advanced with gigantic paces toward the outlawry of all offensive warfare and toward the creation of a procedure admitted by international law which will assure the pacific settlement of all disputes.

The guaranty pact of Lord Robert Cecil and the Protocol of Geneva developed from the idea that it is necessary to create a system of military guaranties to make possible the limitation of armaments by virtue of Article 8 of the Covenant. Of course it must be admitted that because of the refusal

of Great Britain the efforts of the Fifth Assembly did not lead to immediate practical results. The Protocol could not be ratified and hence disarmament was not achieved. Subsequently the system of automatic sanctions has been generally abandoned in most of its phases. But the need for a universal guaranty pact, the interdiction of all aggressive warfare, the creation of a system of unlimited arbitration, and the international limitation of armaments remain. The Fifth Assembly has made these essential principles so clear to the nations that their definite realization may be expected in a not too distant future.

As regards the problem of the outlawry of war which we are here discussing, the Protocol of Geneva introduces a new era. For the victory of a great idea it is not the moment of definite realization which counts, but the moment at which it begins to become a moral force. It was the result of the discussions and labors of the Fifth Assembly which transformed the idea of the outlawry of offensive warfare and which made it the cardinal problem of the League of Nations and of universal peace. And in this connection the influence of the American movement upon the education of public opinion and upon the launching of the Protocol of Geneva deserves honorable mention.

V. THE PACT OF LOCARNO

§ 1. Its Antecedents

The great moral effect of the elaboration of the Protocol of Geneva made itself felt at an early date. Indeed, since the Fifth Assembly the movement in favor of arbitration has been vastly accelerated. In the first place, the number of arbitration and conciliation treaties has grown very rapidly. But that is not all. The reservations which such treaties used to contain have been abandoned. Since the creation of the League of Nations a single arbitration treaty without reservations had been concluded between states belonging to the League of Nations. This was the treaty between Austria and Hungary of April 10, 1923, to which we have already referred. A second treaty of arbitration and conciliation, likewise very far-reaching, was concluded between Italy and Switzerland on September 20, 1924, during the discussions of the Fifth Assembly. After the failure of mediation and upon the demand of one of the parties, it entrusted to the Permanent Court of International Justice the right to settle disputes of any kind, and to regulate even non-juridical differences *ex aequo et bono*. But since 1926 twelve further treaties of arbitration and conciliation without reservations have been concluded. Switzerland, Sweden and Denmark figure prominently.

Under the influence of the ideas prevailing at the time of the elaboration of the Protocol of Geneva, that significant pact was drawn up one year later at Locarno which prohibited a war of aggression between Belgium, Germany and France. No doubt it would be erroneous to maintain that the political steps leading to the conclusion of this pact are to be traced back immediately

to the discussions concerning the Protocol of Geneva. The genesis of the Locarno Pact is to be traced rather to the discussions at Versailles, where France tried to obtain security against an attack by Germany through defensive treaties with Great Britain. At an early date the German Government took the stand that only Germany's participation in a security pact would make of it a powerful factor for peace in western Europe and would deprive it of any dangerous character as a one-sided treaty of alliance.

With this object Chancellor Cuno had, on December 18, 1922, through the mediation of Hughes, the American Secretary of State, proposed his idea to France that Germany, France and the other Great Powers interested in the Rhine should agree mutually and solemnly, in the presence of a non-interested power acting as trustee, not to wage any war for a generation, unless it be specially decided upon by a plebiscite.[1] When the president of the French Council, M. Poincaré, made certain objections to the proposal, pertaining among other things to the possibility of a war in case of a decision by plebiscite, the German Government declared that it desired to establish only a general outline for an agreement and that it was prepared to discuss all details with a view to reaching an understanding.

Several months later Chancellor Cuno, in a note addressed to the Great Powers on May 2, 1923, expanded his former proposal, declaring that he was ready to conclude an agreement whereby all disputes between Germany and France would be settled peaceably. Disputes of a juridical nature were to be settled by arbitration, all other differences by mediation. This proposal found just as little echo in France as did the revival of the Cuno projects by Stresemann on September 2, 1923.

The attempt made later by Stresemann to conclude a Rhine pact was the first which, after long negotiations, led to a positive result. When France tried again to obtain from Great Britain a special guaranty treaty for her security, after the attitude of Great Britain had become known, Stresemann, in the celebrated memorandum of February 9, 1925, proposed to the French Government "that the Powers interested in the Rhine, particularly England, France, Italy and Germany, should agree solemnly not to make war upon each other during a period to be determined later, with the United States of America acting as trustee." To this pact there were to be joined arbitration treaties between France, Germany and other states. At the same time Germany declared her readiness to guarantee the existing status on the Rhine. The note concluded with the following suggestion. The security pact was to prepare a world convention embracing all the states, in the manner of the Protocol of Geneva, and in case a world convention of this nature resulted, the Protocol would be absorbed thereby or incorporated in its text. During the long exchange of notes which followed between the French and German governments, lasting for over six months, there was perfect agree-

[1] Cf. Wehberg, "*Der Pakt von Locarno*," in Strupp's *Worterbuch des Völkerrechts und der Diplomatie*, III, 977. See additional bibliography there.

ment on the principle of the outlawry of offensive warfare and on the necessity of concluding treaties of arbitration. Only on important questions of detail, for example the wording of the arbitration treaties, was there disagreement at first. But the negotiations were finally concluded by the signing of the Pact of Locarno on October 16, 1925.

§ 2. The Interdiction of Offensive Warfare

In Article 2 of the Locarno Pact Germany and Belgium, as well as Germany and France agreed "to resort in no case to an attack or an invasion and not to make war." [1]

This formula is noteworthy in that the contracting parties renounce not only offensive warfare but all "war" against each other. But since the right of "legitimate defense" is expressly reserved in paragraph 2 of this article, the interdiction is practically limited to offensive warfare, just as the corresponding stipulation of the Protocol of Geneva is.

On the other hand not only war in the technical sense, but also an attack and an invasion are prohibited. Hence military occupations are also prohibited by the Pact of Locarno. At the time of the discussions of the Protocol of Geneva there was no complete unanimity on the question whether military reprisals should be interdicted. In view of the political importance of the principle of automatic sanctions the Fifth Assembly, too, wished to limit its application to a case of actual war, without extending it to military occupations. At the time of the negotiations for the Pact of Locarno these objections did not play a decisive part. It was easier to envisage the sum total of the obligations in a convention restricted to a small number of parties.

As at the time of the framing of the Protocol, so too at Locarno it was deemed advisable to express clearly the exceptions to the fundamental principle. In the first place defensive warfare is admitted in accordance with paragraph 2 of Article 2 of the Rhine Pact. The Politis-Benès report on the Protocol of Geneva took the stand that legitimate defense should be regarded not only as a right but even as a duty of the attacked state. But in the Pact of Locarno this principle does not exist. Certainly an attacked state can count upon the aid of the others only if it participates in the measures of military defense taken by the guarantors against the aggressor. But nothing is said in the Locarno Pact about the attacked state having to take the initiative as soon as the attack ensues. If it does so in case of a flagrant violation, it is surely exercising its due right. But if it wishes to wait before answering the attack, in the hope that the government of the aggressor state may at the last moment order its troops to withdraw, or if it wishes to reach a previous agreement with the guarantor states on a joint

[1] There are other recent treaties which contain similar clauses. Cf. *Arbitrage et Sécurité. Etude méthodique des conventions d'arbitrage et des traités de sécurité mutuelle, déposés auprès de la Société des Nations* (2d ed., Geneva, 1927), pp. 353 ff.

plan of action, it may do so. The Pact of Locarno wishes better to adapt the various measures of sanction to individual cases. That is why the contracting parties act in the spirit of the Pact when they check as much as possible all war measures which aggravate the situation and render a pacific settlement more difficult. This thesis may also be admitted because every violation of Article 2 of the Pact of Locarno should, according to Article 4, No. 1, first be brought before the Council of the League of Nations. Before the latter has determined whether there has been a violation, a defensive war is prohibited.[1] An exception is recognized only when there has been a flagrant violation of Article 2, or a flagrant contravention of the regulations for demilitarization contained in Articles 42 and 43 of the Treaty of Versailles, when such contravention constitutes an unprovoked act of aggression and when by reason of the marshaling of armed forces in the demilitarized zone immediate action is necessary. In this case a war of defense may be begun before the Council of the League of Nations has taken up the question. That in case of the flagrant violation of the regulations for demilitarization a defensive war may ensue is a principle open to grave political objections. In the final analysis this would make it possible to wage a preventive war of defense.

The second exception to the principle of the interdiction of war, already contained in the Protocol of Geneva, concerns the measures prescribed by Article 16 of the Covenant and executed by virtue of decisions made by the Assembly or the Council of the League of Nations. It is a curious fact that Article 16 of the Covenant of the League of Nations is modified for the guarantor states of the Pact of Locarno. Except in case of flagrant violation they can take measures of sanction only on the basis of an opinion by the Council of the League of Nations.

Finally the Western Pact makes an exception of every action undertaken in agreement with Article 15, paragraph 7 of the Covenant, provided this action is directed against a state which was first to attack. This exception is not contained in the Protocol of Geneva. It would not have been taken into consideration for the Western Pact either if the latter had not condemned aggressive war, both with regard to the relations of Germany, Belgium and France, and with regard to the relations of Germany and her eastern neighbors. Let us suppose, for example, that in a dispute between Germany and Poland the efforts of mediation by the Council had failed, and Germany availed herself of the right to declare war against Poland—a right which the Pact gives her and which the arbitration treaty with Poland does not withhold. In this case France has the right to support Poland. But this right is recognized only in case Germany was the first to attack. From Article 4 it follows that aid lent by France to Poland is possible if the Council of the League of Nations deems Germany the aggressor.[2] But this

[1] Cf. Rauchberg, *Die Verträge von Locarno* (Prague, 1926), pp. VII ff., and *Friedenswarte*, 1928, p. 70; Wehberg, *op. cit.* See also the discussion by Wehberg-Montgelas in *Der Weg zur Freiheit*, Berlin, August 1, 1927.

[2] Cf. Rauchberg, *op. cit.*, p. VIII.

exception, too, may be questioned. For in the correct interpretation of Article 15, paragraph 7, of the Covenant only the parties to the dispute are authorized to settle a difference by war in case the Council does not agree unanimously, but not other members of the League of Nations.

§ 3. The System of Arbitration

The system of arbitration in the Pact of Locarno is distinguished first of all and in a purely formal manner from that in the Protocol of Geneva by being laid down in special treaties containing also the interdiction of aggressive warfare and the guaranty obligations, and not in a uniform treaty. Article 3 of the Rhine Pact establishes only the general principles for the settlement of juridical and political disputes between Germany and the two western powers, Belgium and France. The details of the procedure for the pacific settlement of disputes are contained, so far as they concern the relations of Germany, Belgium and France, in two "arbitration conventions," and, so far as they concern disputes between Germany, Poland and Czechoslovakia, in two "arbitration treaties."

Like the Protocol of Geneva, the treaties of Locarno foresaw a special procedure for disputes of a juridical or political nature. The differences of opinion relative to the rights which the parties believe they possess are submitted to the judgment of impartial judges, as in the regulations of the Protocol. As for disputes of a political nature, no procedure was prescribed at Locarno which might lead to a definite decision. In order to settle them, permanent commissions of mediation were instituted and, in case the negotiations of these commissions lead to no result, Article 15 of the Covenant is resorted to. Hence it is possible that political disputes may not be definitely settled by the procedure prescribed by the Pact of Locarno. In such a case the Covenant of the League of Nations leaves open the possibility of a settlement by arms under certain given conditions. In Article 2 of the Western Pact this possibility is eliminated so far as the relations of Germany to Belgium and France are concerned, while in the relations of Germany to Czechoslovakia and Poland the possibility of a settlement by arms is still left open.

In a system of this kind, which in political disputes does not necessarily lead to a definite decision which would bind the parties, reservations seem less desirable than in the practically unlimited arbitration prescribed by the Protocol of Geneva. As regards disputes about changes in territorial frontiers, Article 1 of the Rhine Pact contains a guarantee of territorial *status quo* in the west, so that in the relations between Germany, on the one hand, and Belgium and France on the other, there is no possibility of bringing a question of frontier before an arbitral tribunal. As for the other reservations of the Protocol of Geneva, the general provisions of the Covenant of the League of Nations remain in force, especially Article 15, paragraph 8, and Article 19.

§ 4. The Sanctions

The Pact of Locarno does not merely prohibit offensive warfare and create a system of arbitration. In Article 4 it also prescribes sanctions in the event of violation of Article 2 of the Pact or of the regulations for demilitarization laid down in Articles 42 and 43 of the Treaty of Versailles. In this event each of the contracting parties must bring the matter before the Council of the League of Nations as soon as possible.

Only after the Council has determined a violation or an offense, are the guarantors, Belgium, Germany, France, Great Britain and Italy, obliged to lend their aid.

If there is a flagrant violation of Article 2 of the Rhine Pact, or if there is a flagrant case of disregard of Articles 42 and 43 of the Treaty of Versailles, aid must, however, be given even before the Council has taken up the matter. But the violation or offense must constitute an unprovoked act of aggression, and immediate action must be necessary either on account of the violation of a frontier, or on account of the opening of hostilities, or on account of the marshaling of armed forces in the demilitarized zone. In these cases the question must be subsequently submitted to the Council. The latter must agree unanimously, the votes of the belligerent parties being disregarded so far as the question of unanimity is concerned. The Council then determines whether there was a violation or an omission, and what measures should be taken. The Council must have affirmed the violation or offense before the attacked state and the guarantor states have the right to continue taking military measures. In contrast to the clauses of the Protocol of Geneva, the Council has the right, according to Article 4, No. 3 of the Pact of Locarno, to decree an armistice in any case, and not only in case the aggressor cannot be determined.

If Germany, Belgium or France refuse either to adopt a peaceful procedure, or to execute an arbitral or judicial decision, military sanctions are applied, according to Article 5 of the Rhine Pact, only if there is a war of aggression at the same time or if the regulations for demilitarization of Articles 42 and 43 of the Treaty of Versailles have been violated. If such is not the case, if for example one of the states simply refuses to comply with an award, without taking up arms, the Council must decide upon proper measures, but they shall not take the form of military sanctions.

This system is, on the one hand, a considerable amelioration of the provisions of Article 16 of the Covenant. Not the guarantor states but the Council decides in principle whether there has been a violation of the law. In contrast to the provisions of the Protocol of Geneva, no presumptions having an automatic effect are foreseen for determining the aggressor. Consequently the idea often repeated in America, that the Pact contains the principle: "Whoever refuses arbitration is the aggressor," cannot be called correct. But it may be admitted that a state engaged in a war, after having

refused arbitration, will ordinarily have against it the presumption of the Council, which will consider it the aggressor. But according to the Rhine Pact the Council should take into account the special circumstances which govern the individual case, and should determine the aggressor. In contrast to the regulations of the Protocol of Geneva, discussions must in every case take place before the Council with a view to determining the aggressor.

Yet in other respects the system of sanctions in the Pact of Locarno, which has all the earmarks of a compromise, cannot be considered a step forward. While the Protocol of Geneva authorizes the guarantor states to resort to military means only after the aggressor has been determined, it is necessary, according to the Rhine Pact, to come immediately to the assistance of the attacked state in case of a flagrant attack, and to lend it military aid even if the Council has not yet met. Article 5 of the Pact requires the powers to aid the attacked state in such a case, before the Council has rendered its opinion, while Article 16 of the Covenant had merely left this possibility open.[1] Accordingly it is possible that sanctions may be employed against a state which the Council will not consider the aggressor. Thereby the chances of settling the dispute otherwise than by force of arms are diminished. And if the Council decrees an armistice, this order is less likely to be obeyed if the war of sanctions has already begun. The idea that an attacked state can be aided only by military means still prevailed during the negotiations at Locarno, just as it did in the Fifth Assembly. It was not yet realized that Article 11 of the Covenant is more important than Article 16, and that everything should tend toward one goal, namely to prevent war up to the last moment instead of resorting immediately to military sanctions. For the same reason the idea of exerting a pressure upon the aggressor state by means other than military was relegated to the background. It is to be regretted that the framers of the Rhine Pact had in mind only perfidious attacks undertaken in full realization of the consequences, and not complications brought about by passions of the moment which could perhaps be dispelled.

At any rate the system of sanctions predicated by the Rhine Pact is on the whole an attenuation of the automatic sanctions of the Protocol of Geneva. Each guarantor state must first of all examine with care the question whether the conditions of Article 2 of the Rhine Pact have been realized. This is a safety valve against the abuse of sanctions. They should not be used automatically, but only when a presumption exists. But it is very regrettable that sanctions are provided at all, and that in given cases the guarantor states shall employ them before the Council has determined the aggressor or has had an opportunity to settle the dispute at the last moment

[1] Since the League of Nations has given Art. 11 of the Covenant precedence over Art. 16, it is to be assumed that the members of the League of Nations will always have to postpone the sanctions until the Council has taken measures in accordance with Art. 11 and has determined the aggressor. Cf. the correct interpretation in *Rapports et Résolutions concernant l'article 16 du Pacte* (Geneva, 1927), p. 83.

by other than military means. Thus the Council is deprived of its rôle as peace-maker, and the decision is entrusted to the generals.

§ 5. Critique of the Pact of Locarno

The Pact of Locarno may certainly be looked upon as a Protocol of Geneva limited to a small number of states. Quite like the Protocol, the Rhine Pact does not represent merely a defensive treaty, but, by interdicting offensive warfare, by constructing a system of arbitration and by decreeing sanctions, it seeks to transcend the general provisions of Article 16 of the Covenant of the League of Nations, to create a greater measure of security, and to facilitate at the same time the limitation of armaments. This is expressed with perfect clarity in the final Protocol of Locarno, as well as in the Protocol of Geneva.

In detail, no doubt, the Rhine Pact differs notably from the Protocol of Geneva. It is true that in the two treaties the interdiction of war is limited to war of aggression, while defensive warfare and sanctions are declared permissible. But the Rhine Pact, in contrast to the Protocol of Geneva, permits defensive warfare only when there has been a flagrant violation or when the Council has established a case of aggression. The system of arbitration in the Rhine Pact is likewise different from that of the Protocol. The latter provided arbitration for almost all disputes, while in the Pact of Locarno only legal questions can be settled by arbitration. Political questions are regulated by mediation. Finally the Rhine Pact takes its own course with regard to sanctions. It has abandoned the automatic determination of the aggressor. But in return it provides that aid should be given to the attacked state before the Council has determined the aggressor. Finally it should be noted that in the Pact of Locarno the frontiers are definitely guaranteed, while in the Protocol of Geneva a revision of the frontiers was prohibited only in case it had been achieved by arms or by means of an arbitral procedure.

As was indicated in the discussion of the system of sanctions, the Pact of Locarno has all the characteristics of a compromise between opponents and friends of the Protocol of Geneva. In certain respects the Rhine Pact abandons the principles of the Protocol of Geneva, but in other respects it embodies them. It is quite under the influence of the ideas of the Protocol, particularly with regard to sanctions. But on important points it reverts to the ground taken by the Covenant of the League of Nations. The system of arbitration of the Pact of Locarno is more similar to that of the Covenant of the League of Nations than to that of the Protocol of Geneva.

On the whole it could not be said that the numerous changes which the Rhine Pact contains over the Protocol of Geneva signify an improvement. The Rhine Pact, which is not the result of one single action but of mutual concessions made by the parties, regulates the problems differently, in the

main, but neither better nor worse than the Protocol does. At Locarno, one year after the Fifth Assembly, there were no new practical experiences or theoretical teachings which could be employed. The report of M. de Brouckère which gave Article 11 precedence over Article 16, had not yet been drawn up in 1925. That is why the Conference of Locarno was, in the final analysis, dominated by the same spirit as was the Fifth Assembly. The Protocol of Geneva and the Pact of Locarno both belong to the same phase of development of the League of Nations, a phase in which too much importance was attached to military sanctions.

For the perfection of international law, the principle of the Rhine Pact, according to which defensive war can be begun only after the approval of the Council, is of great importance. For the first time and perhaps more or less unconsciously the statesmen came to realize the great idea that the League of Nations has the mission to assure security to the vital interests of the states, and that if the anarchy of war is to be done away with, a state is to be permitted to act against the aggressor only in the capacity of an instrument of the League of Nations.

The criticisms of the Pact of Locarno and of the most important of its provisions, from the point of view of the history of the League of Nations, should not lead us to underestimate the *political* importance of the Pact. Indeed, the capital importance of the fact that in 1925 Belgium, Germany and France declared themselves ready to renounce all offensive warfare can not be emphasized too strongly. After the disappointment brought about by the failure of the Protocol, the nations now realized that the idea of outlawing war was no longer of necessity Utopian, and that in a part of the world where peace had been endangered for centuries the nations were extending each other their hands for the future pacific settlement of their difficulties. They have also been impressed by the fact that the Rhine Pact, ratified by all the contracting powers, has become a reality, while the Protocol of Geneva remained only a project. In the public opinion of the United States the Pact of Locarno also found an echo. For the first time there was seen a positive victory of that peace movement which parallels the efforts of the League of Nations. With more confidence the hope is now voiced that collaboration between the United States and the powers of the League of Nations will be possible. This fact has exercised a considerable influence upon the exchange of views which took place later between the United States and the powers in the League of Nations on the subject of the outlawry of war. Though it cannot be said that systematically the Rhine Pact is an improvement over the Protocol of Geneva, it can be said that politically it has furthered the development of the League of Nations and the idea of the outlawry of war.

VI. THE NEGOTIATIONS OF THE LEAGUE OF NATIONS SINCE 1925

§ 1. The Resolutions of the Sixth and Eighth Assemblies against Offensive Warfare

A. The Sixth Assembly

Before the Pact of Locarno was concluded the Sixth Assembly (1925) had already taken up the question of the outlawry of war. When at the time of the general discussion in the Sixth Assembly on the subject of the report of the Council the failure of the Protocol was discussed, many speakers pleaded for the great creation of the Fifth Assembly. After the delegates of Belgium, France, Poland, Czechoslovakia, Rumania, Finland, Bulgaria, Hungary and Denmark, the representative of the Netherlands, Loudon, made the following declaration: "The Protocol is not dead; it is most certainly not buried; it but slumbers." Moreover he referred to the support which Professor Shotwell had given the League of Nations.[1] To give new impulse to the movement, the Spanish delegate Quiñones de León proposed in the eighth plenary session of September 12, 1925, a resolution in which the Council was requested to make preparations looking forward to an international disarmament conference.[2] The second paragraph of this resolution read, "Proclaiming afresh that a war of aggression constitutes an international crime . . ."

In the course of the discussions of the first commission, and especially in the subcommission instituted by it, Rolin (Belgium) protested against the version proposed by Spain. He insisted that the Assemblies of the League of Nations had upon various occasions declared that war is an international crime, but that they had inserted this declaration in drafts of agreements which were in future to impose upon the states the obligation of not resorting to war in any case. He said that if we limit ourselves to fixing the existing law, it is wrong to maintain that every war of aggression is an international crime.[3] This was also the opinion of the Brazilian delegate Fernandez. Instead of "offensive warfare *constitutes* an international crime" he proposed "offensive warfare *should constitute* an international crime."[4] This formula satisfied the Spanish delegate, who declared that he would adopt it if it met with general approval. But at the same time he stated that the Spanish Government saw no objection to maintaining that offensive warfare is already an international crime.[5] Babinsky (Poland),[6] whose opinion was in principle also that of Osusky (Czechoslovakia),[7] wished also to answer in the affirmative the question whether war was already a crime according to existing law. Finally he declared that he approved the amendment of Fernandez. In this form the Spanish motion, which constituted a part of a lengthier resolution, was adopted by the first commission on September 23,[8] and

[1] *Actes de la VI^e Assemblée. Séances Plenières*, p. 47. [2] *Idem*, p. 60.
[3] *Procès-verbaux de la Première Commission*, pp. 31, 32. [4] *Idem*, pp. 26, 31.
[5] *Idem*, p. 31. [6] *Idem*, pp. 27, 32. [7] *Idem*, pp. 26, 29. [8] *Idem*, p. 29.

later by the seventeenth plenary session on September 25, 1925.[1] During the discussions in plenary session Lord Robert Cecil made the following remarks:[2]

> I, personally, attach great importance to that paragraph in which aggressive war is formally denounced. I believe it to be of the utmost importance to impress that principle strongly upon the minds of the peoples of the world. Under the old system of international law, war was a right. We are now prepared to say, and to say it with all the authority of this Assembly, that aggressive war is an international crime.

The declaration of the Sixth Assembly against offensive warfare does not mean to establish new law. It merely desires to express a wish, in view of the imperfection of existing law. It establishes that, according to the Covenant of the League of Nations, every offensive war is unfortunately not an international crime[3] and that it is necessary to fill this gap.[4] This intervention in favor of the improvement of existing law is no doubt equivalent to the moral condemnation of all offensive warfare.

The significance of this *voeu* was no doubt diminished by the fact that instead of taking the form of an independent resolution it was only a commentary upon a resolution which provided for the calling of a disarmament commission. It did not address itself to any organ of the League of Nations, requesting it to take up the matter of the outlawry of war. Nothing but a very general formula was evolved. The advantage of the outlawry of war was merely stated in an incidental way on the occasion of the request to the Council regarding a commission for the preparation of disarmament. That explains why the Seventh Assembly did not take up the question of the outlawry of war, but restricted itself to a general declaration which assimilated the principles of Locarno to those which every civilized nation should apply in its external policies.

B. The Eighth Assembly

A very important discussion from the political point of view took place in the Eighth Assembly on the subject of the outlawry of war (1927).[5] It will be recalled how the attention of the entire world was attracted at the beginning of the session when it was learned that Poland intended to propose to the Assembly the draft of a non-aggression pact. During the first days of the Eighth Assembly the Polish pact was the chief topic of discussion. When a little later the Netherlands proposed a reexamination of the principles of the Protocol of Geneva, the interest of the Assembly became even more keen. Many expected that the attempt made in the Fifth Assembly

[1] *Séances Plenières*, p. 130. [2] *Idem*, p. 121.

[3] Cf. the observations of Limburg (Netherlands) and Motta (Switzerland), *Procès-verbaux de la Première Commission*, pp. 27, 28.

[4] Cf. the observations of Loucheur (France), *idem*, p. 27.

[5] Cf. Erich, "*L'Interdiction de la guerre d'agression*," *Revue de droit international*, 1927, I, No. 3; Garner, "Arbitration and Outlawry of War at the Eighth Assembly of the League of Nations," American Journal of International Law, 1928, p. 132; "The League of Nations and Outlawry of War," Foreign Policy Association, Information Service, III (No. 25), 399.

would be revived. To be sure, the great discussions of the Eighth Assembly netted a whole series of important measures, especially the creation of the Committee of Arbitration and Security. But regarding the problem of offensive warfare, the results did not at all meet the hopes which had been so high.

The original version of the Polish motion was not submitted as such to the Assembly of the League of Nations. The general opinion at the beginning of the Assembly was that the motion aimed to create, so to speak, a sort of substitute for the missing East-Locarno Pact. It was reasoned that without doubt the preamble of the eastern arbitration treaties concluded at Locarno contains this provision: "that the respect for the laws established by the treaties or resulting from international law is obligatory for the international tribunals." But a guarantee of frontiers is thereby not established any more than in the Rhine Pact and, with regard to the relations of Germany and Poland, the possibility of settling disputes by war is not completely excluded. It was then thought that the Polish motion sought a substitute for the Locarno of the East, which had not seen the light of day. We shall not try to decide the question whether that is correct. At any rate it is certain that the proposal was considerably modified in the secret discussions which took place at the opening of the Eighth Assembly. It was presented to the Assembly in the ninth plenary session of September 9th in a decidedly weakened form.[1] Meanwhile the draft of the non-aggression pact had become a declaration on the outlawry of aggressive war, a declaration which, according to the explanation of the Polish delegate Sokal, had only a moral significance. In the form in which it was presented to the Eighth Assembly the proposal had universal approval. Even Scialoja[2] (Italy), who declared these "ineffective *voeux*" dangerous, did not oppose the adoption of this resolution.

In the discussions of the third commission of the Eighth Assembly it became clear that by the declaration which Poland had initiated the Assembly wished only to forbid wars of aggression already interdicted by the Covenant. It was repeatedly insisted that according to the Covenant, for example, Article 15, paragraph 7, certain restricted wars are permitted between states belonging to the League of Nations and that they will be permitted in the future.[3] It was for this reason that the representative of the Netherlands, Loudon,[4] for a while planned to interdict all offensive warfare by an amendment to the Polish motion, and at the same time to give the interdiction a binding form. But this plan was not carried out during the discussions of the Eighth Assembly. The Japanese delegate Nagaoka[5] declared, without

[1] *Actes de la VIII^e Session ordinaire, Séances Plenières*, p. 84. [2] *Idem*, p. 84.
[3] Cf. the remarks of Politis (Greece). *Documents de la Commission Préparatoire de la Conférence du Désarmement.* Série VI (No. 71), p. 135. See also the opinion of Erich, *op. cit.*, p. 756.
[4] *Actes de la VIII^e Session ordinaire de l'Assemblée. Procès-verbaux de la Troisième Commission*, pp. 21, 46, 47. [5] *Idem*, p. 46.

meeting with any opposition, "that the draft resolution in its entirety would not exceed the obligations laid down in the Covenant."

From the exchange of views which took place in the Eighth Assembly on the Polish motion it can be deduced that the resolution is to extend also to the relations between states which are members, and states which are not members of the League of Nations.[1] It was insisted again and again that the interdiction of offensive warfare had a real meaning only if the term aggressor was defined.[2] The German Minister of Foreign Affairs Stresemann demanded that not only "aggression" but also "force" and "violence"[3] be renounced.

The motion was finally adopted unanimously in the commission as well as in the plenary session. During the report before the eighteenth plenary session of the Eighth Assembly, Sokal (Poland) spoke. According to him,[4] the commission had been of the opinion that a declaration establishing that offensive warfare cannot serve as a means of settling disputes and should be considered an international crime would exercise a favorable influence upon the opinion of the world.

The following is the final version of the resolution voted in the Eighth Assembly on the initiative of Poland:

The Assembly,

Recognising the solidarity which unites the community of nations;

Being inspired by a firm desire for the maintenance of general peace;

Being convinced that a war of aggression can never serve as a means of settling international disputes and is, in consequence, an international crime;

Considering that a solemn renunciation of all wars of aggression would tend to create an atmosphere of general confidence calculated to facilitate the progress of the work undertaken with a view to disarmament:

Declares:

1. That all wars of aggression are, and shall always be, prohibited.

2. That every pacific means must be employed to settle disputes, of every description, which may arise between States.

The Assembly declares that the States Members of the League are under an obligation to conform to these principles.

The resolution was not passed as a modification of the Covenant.[5] It can have only a moral significance. Formal amendments were purposely avoided, but it is not easy to understand why the outlawry of war was re-

[1] *Actes de la VIII^e Session ordinaire de l'Assemblèc. Procès-verbaux de la Troisième Commission*, pp. 46, 47. Cf. especially the remarks of Guerrero (El Salvador). See also the remarks of Sokal (Poland) in the ninth plenary session, and of Erich in the nineteenth plenary session. *Séances Plenières*, pp. 34, 171; cf. Erich, "*Les traités de non-aggression entre membres et non-membres de la Société des Nations*," *Revue de droit international et de législation comparée*, 1926, p. 613.

[2] Cf. Politis (Greece) in the sixth plenary session; Koumanoudi (Kingdom of the Serbs-Croats-Slovenes) in the twentieth plenary session; and Loudon (Netherlands) in the seventh session of the third commission, *Séances Plenières*, pp. 62, 175; *Procès-verbaux de la Troisième Commission*, p. 46.

[3] *Actes de la VIII^e Session ordinaire de l'Assemblée, Séances Plenières*, p. 81.

[4] *Idem*, p. 155.

[5] This failure to modify the Covenant should not be judged too severely. It will be recalled what sad experiences the League of Nations had with the modifications decided upon in the Second Assembly.

stricted to those very wars which had already been interdicted by the Covenant. Only a resolution excluding all offensive warfare would have had significance. The objection may also be raised that the Assembly allowed the public to believe that all offensive warfare had been interdicted, while this was really not the case. The excellent intentions of states like the Netherlands and[1] Norway,[2] which would gladly have passed the resolution and outlawed war, were unfortunately not realized. In view of the difference between what it seemed to say and what it really contained, the resolution of the Eighth Assembly is actually not a great step forward. The Sixth Assembly had declared the outlawry of war desirable. It wished to transcend the Covenant. The Eighth Assembly contented itself with solemnly outlawing offensive wars already interdicted by the Covenant.

In conclusion we shall mention the discussion which took place in the Eighth Assembly on the motion of the Netherlands. It was called forth by the difficulties which appeared in the commission preparing for the disarmament conference. The desire was to resume the principles of the Protocol of Geneva. So far as the discussions concerned in general the problem of security, it will suffice to recall that it was decided to create the committee of arbitration and security, a very significant body which was a part of the commission preparing for the disarmament conference. For the problem which interests us here primarily it is significant that the delegates of the Netherlands, Beelaerts van Blokland and Loudon, in justifying their motion, spoke in detail of the American movement for the outlawry of war and demanded that all aggressive warfare be outlawed and declared an international crime. "We must realise," said the Netherland Minister of Foreign Affairs one day,[3] "that public opinion in different countries is moving in this direction, and that, particularly in overseas countries, there is a growing current of opinion which has adopted as its watchword 'the outlawry of war.' Has not the moment come, I ask, to resume our efforts to bridge the gap in Article 15 of the Covenant by excluding legitimate warfare in the future and by stigmatising a war of aggression as an international crime?" Loudon[4] also alluded to the American movement and stated that it met with no objection either on the part of the governments or on the part of the peoples. He mentioned also the resolution of Senator Borah and a new project for the outlawry of war worked out by Professor Shotwell, which we shall discuss below. Later, particularly in the nineteenth plenary session,[5] Loudon insisted strongly that the committee of arbitration and security should take up the question of the treaties to be drafted for the outlawry of war. He declared that the Assembly of the League of Nations should en-

[1] *Actes de la VIII^e Session ordinaire de l'Assemblée. Procès-verbaux de la Troisième Commission*, pp. 46, 47.
[2] *Idem*, p. 47. Cf. also the remarks of Erich in the committee of arbitration and security. *Documents de la Commission préparatoire de la Conférence du désarmement*, Série VI, pp. 27, 69.
[3] *Séances Plenières*, p. 40. [4] *Procès-verbaux de la Troisième Commission*, p. 21.
[5] *Séances Plenières*, p. 162; cf. also *Procès-verbaux de la Troisième Commission*, p. 54.

courage the states to conclude treaties of this kind, especially between members and non-members of the League of Nations. The American idea of the outlawry of war, he stated, merits the favorable support of the Assembly. It has never been clearer that with regard to the idea of the outlawry of war the League of Nations and the United States of America are striving in the same direction and that, however different their notions on the organization of the world and on the ideal system to be adopted, there is full accord between them as to the necessity of outlawing war.

Although the Eighth Assembly achieved no positive results in the matter of the outlawry of war, except for the establishment of the committee of arbitration and security, yet it should be praised for having forcibly called the attention of the world to this great problem. But it is undoubtedly regrettable that the resolution adopted with regard to the Polish proposal concerning the outlawry of aggressive war pertained only to wars already interdicted by the Covenant of the League of Nations.

§ 2. The Graeco-Bulgärian Conflict and the Problem of Defensive Warfare

The resolutions of the Sixth and Eighth Assemblies concerned only the outlawry of offensive warfare. As regards defensive warfare, the Protocol of Geneva had declared that it was not only a right but even a duty for an attacked state to undertake it. But the Pact of Locarno established in principle that defensive warfare, except in the case of flagrant violation, should be undertaken only after the intervention of the Council of the League of Nations, which determines the case of aggression. It was the first time that the dangers not only of offensive warfare but also of defensive warfare were recognized, and that in order to eliminate it, measures, however insufficient, were taken. A few days after the conclusion of the Pact of Locarno the Graeco-Bulgarian frontier incident gave the League of Nations an opportunity to deal more thoroughly with the problem.

If the discussions in the Council of the League of Nations on this subject found some echo, it was due especially to the fact that through the speedy intervention of the president of the Council the pacific settlement proved a perfect success.[1]

It is clear how important it is for the Council of the League of Nations to be able to meet at short notice and for the president to be able to get in touch as quickly as possible with the principal capitals of the world. But in the present study we should dwell upon this incident only to the extent that it obliged the Council to take a stand on the problem of defensive war.

The Graeco-Bulgarian dispute broke out on October 19, 1925. Some de-

[1] Cf. especially Mantoux, Journal of the British Institute of International Affairs (1926), V, 16; Mantoux, "*Fédération universitaire internationale pour la Société des Nations*," *Bulletin trimestriel*, March, 1926, p. 11; Testis, 31, *Revue des Deux Mondes* (1926), p. 910.

tachments of Bulgarian and Greek guards had exchanged shots as the result of misunderstanding or because they had exceeded their powers. The commander of the Greek frontier troop, believing that the Greek frontier was menaced, ordered his troops to advance into Bulgarian territory. This gave the incident a very grave character. Happily, Bulgaria did not reply with counter-measures of a military character. It chose to present the matter to the Council on October 22, referring to Articles 10 and 11 of the Covenant. On the following day, October 23, Briand, president of the Council of the League of Nations, addressed an appeal to the two parties,[1] inviting them to suspend hostilities and to effect the withdrawal of their troops behind the frontier. Greece replied to this invitation by a telegram addressed to the Secretary General of the League of Nations on October 24. It stated among other things, "It is therefore clear that all the measures which the military command has been compelled to take are nothing but measures of legitimate defence."[2]

And for the time being Greece did not withdraw her troops from Bulgarian territory.

Such was the situation when the Council met on October 26, 1925, in an extraordinary session. It was decided to "invite" the parties to make known to the Council within twenty-four hours whether the order to withdraw the troops behind the frontier had been obeyed, and to state within the next sixty hours whether the troops had been effectively withdrawn behind the frontier and whether the hostilities had ceased. On this occasion the British Secretary for Foreign Affairs, Chamberlain, pronounced the following words:[3]

> Such incidents as that which has caused our present meeting have sometimes had very serious consequences in the past, when there was no machinery such as that offered by the League for their peaceful adjustment and for securing justice to both parties; but it would be an intolerable thing—I go so far as to say that it would be an affront to civilisation—if, with all the machinery of the League at their disposal and with the good offices of the Council immediately available—as this meeting shows—such incidents should now lead to warlike operations instead of being submitted at once for peaceful and amicable adjustment by the countries concerned to the Council, which will always have regard to their honour and to the safety and security of their nations.

At midnight of October 28, eight hours before the period fixed by the Council, the Greek troops finally quit Bulgarian territory. When the Council, in its meeting of October 28, 1925, learned of this and was assured that the evacuation had been decreed, the President of the Council, M. Briand, spoke again of the problem of legitimate defense:[4]

> He had understood the representative of Greece to indicate [he observed] that all these incidents would not have arisen if his country had not been called upon to take rapid steps for its legitimate defence and protection. It was essential that such ideas should not take root

[1] "J'exhorte donc les deux gouvernements . . ."
[2] *Journal Officiel de la Société des Nations* (November, 1925), pt. 2, p. 1697.
[3] *Idem*, p. 1699.
[4] *Idem*, p. 1709.

in the minds of nations which were Members of the League and become a kind of jurisprudence, for it would be extremely dangerous. Under the pretext of legitimate defence, disputes might arise which, though limited in extent, were extremely unfortunate owing to the damage they entailed. These disputes, once they had broken out, might assume such proportions that the Government, which started them under a feeling of legitimate defence, would be no longer able to control them.

The League of Nations, through its Council, and through all the methods of conciliation which were at its disposal, offered the nations a means of avoiding such deplorable events. The nations had only to appeal to the Council. It had been shown that the criticisms which had been brought against the League of Nations to the effect that its machinery was cumbersome and that it found it difficult to take action in circumstances which required an urgent solution, were unjustified. It had been proved that a nation which appealed to the League, when it felt that its existence was threatened, could be sure that the Council would be at its post ready to undertake its work of conciliation.

These words had the approval of all the other members of the Council. Chamberlain in particular spoke again of "the restraint which nations concerned in unfortunate incidents of this character might be expected to exercise in view of the fact that the Council could be immediately convened and could use its good offices to reconcile disputants."[1]

If we would determine the meaning of the declarations made by the members of the Council, we may be sure that the Council desired to point out the great dangers of a defensive war not only for Greece and Bulgaria but for all the members of the League of Nations. It wished to make clear that when the existence of a state is menaced, especially in case of aggression, measures of military defense, especially defensive war, must be avoided, and instead the League of Nations must be consulted. These principles should be observed not only by the small and medium-sized states.[2] Since the League of Nations is rightly committed to the principle of the equality of states, no distinctions should be made in such cases between Great Powers and the other members of the League of Nations, and uniform principles should be established for all members of the League of Nations. No weight should be attached to the fact that in the dispute which gave rise to this general discussion no Great Power was implicated.

To the thesis that the Council interdicted defensive war on this occasion, the following objection could be made. The Council merely wished to express the truth that a member of the League of Nations should not press his rights by military means. The words of the Council are directed more against offensive than against defensive warfare. But to this it may be answered that the declarations of the Council intended to refute the assertions of Greece, which claimed that it was obliged to defend itself against a Bulgarian attack. Proof of this is that Briand and Chamberlain spoke exclusively of the danger presented by measures taken under the pretext of legitimate defense. Moreover, if the Council had wished to interdict merely offensive warfare, it could have limited itself to a reproach to Greece

[1] *Journal Officiel de la Société des Nations* (November, 1925), pt. 2, p. 1709.
[2] Cf. Madariaga, Disarmament (Oxford, 1929), p. 42.

for not having first submitted the dispute to the procedure of pacific settlement provided by Article 12 of the Covenant.

Nor can it be said that the Council wished merely to interdict military reprisals. To be sure Greece, in order to justify its attitude, had remarked that aside from resorting to legitimate defense it had applied only measures of military constraint not interdicted by the Covenant of the League of Nations.[1] But the words of Briand and Chamberlain cited above concerned in general the thesis maintained by Greece. The latter affirmed that it had been attacked and that it had availed itself of its right of legitimate defense. Briand and Chamberlain did not deal exclusively with recourse to military measures for defense without declaration of war. For when it is a question of replying to an attack, there can be no distinction between military counter-measures in war and military counter-measures outside of war. When Briand spoke of the devastations which may result from the military resistance of the parties to the dispute, he was thinking above all of legitimate defense in the form of defensive warfare.

Moreover the Council did not wish to limit its principles to the case in question, that is to say to a frontier incident, although it is likely that Briand and Chamberlain, preoccupied with the Graeco-Bulgarian dispute, were thinking of this sort of difficulty above all. Briand stated as a general thesis that a nation which feels its existence threatened may count upon assistance. In this he wished to draw general lessons from the incident. He was thinking also of very grave conflicts which the menaced party may rightly consider an actual attack. The members of the Council could indeed not forget that the invasion of foreign territory which has more serious consequences than mere frontier incidents or skirmishes between small detachments, is an act of special importance to universal peace; and that if the League of Nations is to fulfill its lofty mission it cannot refrain from undertaking to settle disputes of this character. That is evident for anyone who recalls the basic thoughts which were expressed by Briand and Chamberlain and which met with the approval of all the members of the League. The League of Nations, they said, is there precisely to protect the vital interests of the states. Not the individual state should protect itself. Furthermore Chamberlain declared in the final session of the Council on October 30, 1925,[2] "a threat of war anywhere is a menace which comes home to us all and which affects us all." In other words, he wished to construe the lesson to be drawn from the Graeco-Bulgarian incident not in a narrow way but in the broadest possible manner. That is why we should also refrain from applying any interpretation which would derive from the discussions in the Council only a warning against not transgressing the law of legitimate defense.

[1] Cf. Sarailieff, *Le Conflit gréco-bulgare d'octobre 1925 et son règlement par la Société des Nations, Thèse de Grenoble* (Amsterdam, 1927), pp. 110, 116; Tenekidès, *Revue de droit international et de législation comparée*, 1926, p. 412.

[2] *Journal Officiel de la Société des Nations* (November, 1925), pt. 2, p. 1715.

Finally we must avoid a false interpretation of the words spoken by the members of the Council. It should not be said that they wished to interdict legitimate defense only on condition that the Council is able to assist the menaced state. Briand showed with the greatest clarity that the League of Nations is always ready when it is a question of protecting the vital interests of a state. But Briand correctly realized that it should not be left to the governments to judge whether the League of Nations is in a position to aid them. The states must first of all try to protect their vital interests with the aid of the League of Nations. Otherwise the danger would arise that the states would turn to the League of Nations only in case of insignificant disputes and, in case of really important disputes, would take the liberty of insuring personally the defense of their vital interests.[1]

But in interpreting the declaration of the Council it should not be overlooked that the Council did not have the intention of increasing the number of wars legally prohibited by the Covenant of the League of Nations.[2] Chamberlain, in the report which he presented to the Council on December 14, 1925, on the facts of the Graeco-Bulgarian incident, did not say a word which tended to condemn in principle the right of legitimate defense. On the contrary, he shows in his report that the local authorities and the Greek Government "were entitled to take within the Greek frontier all military measures which they considered the security of the country necessitated."[3]

The principles expressed in the earlier session of the Council were, therefore, not taken up again here. Of course we must admit that the Council, in establishing the responsibility for the frontier incident, could not yet use the principles which were established later. The silence of Chamberlain in his report shows that there was no desire to establish new juridical principles on the subject of defensive war, but that the intention was merely to determine a program for the future.

Despite this restriction, the position taken at the time by the Council is very significant. It may even be regarded as a turning-point in the history of ideas which the League of Nations has developed on the problem of war. On the one hand the members of the League of Nations are shown very clearly that as a guiding principle the League of Nations should watch over their vital interests, and that they should abstain from all unilateral military measures. On the other hand it is declared that the mission of the League of Nations is to be ever present when the vital interests of a people are menaced.

The great importance of this attitude has up to now not been properly stressed by writers on the Graeco-Bulgarian incident.[4] But Mariotte, in his

[1] Cf. *Friendenswarte*, 1928, p. 84; *Annuaire de l'Institut de Droit international, Travaux préparatoires de la Session de Lausanne* (Brussels, 1927), II, 816.

[2] It could not do this anyway, since the Covenant can only be changed according to Art. 26.

[3] *Journal Officiel de la Société des Nations*, February, 1926, p. 173.

[4] Baker, The League of Nations at work (London, 1926), p. 50; Garner, American Journal of International Law, 1926, p. 337; F. de Gerando, *L'incident gréco-bulgare d'octobre 1925* (Sofia, 1926); Hoijer, *Le Pacte de la Société des Nations* (Paris, 1926), p. 208; Mandelstam, *Recueil des Cours (Académie de Droit International)*, XIV, 578; van Meurs, *De Volkenbond* (Leyden, February 15, 1926); Ripken, *Völkerbundfragen*, Berlin, 1926, Nos. 1–2; Sarailieff,

Paris doctoral thesis entitled *Les limites actuelles de la compétence de la Société des Nations* attaches great importance to this declaration of the members of the Council.

> The right of legitimate defense [he states][1] was not recognized, and the Council felt that international prudence decreed to the states not to seek vengeance themselves in case they suffered any attack whatsoever. This only aggravated matters by provoking reprisals on both sides. In order to obtain reparation the members of the League of Nations should have recourse to the League.

Similarly the excellent report which Borel and Politis presented to the Institut de Droit International in 1927 on "the extension of obligatory arbitration and the composition of the Permanent Court of International Justice," recognizes clearly the importance of the attitude taken by the Council toward the Graeco-Bulgarian incident. It states that the declarations made by the Council on that occasion may be considered in a sense as the most important step taken after the Protocol of Geneva and the Pact of Locarno on the road which leads to the interdiction of war. The report reads:[2]

> Finally on the occasion of the recent incident between Greece and Bulgaria the Council proclaims and applies the principle that a state in the League of Nations, even if it believes that it is acting for its own legitimate defense, is not authorized to resort to force of arme when it can effectively call for the immediate and useful intervention of the League of Nations for the purpose of protecting its menaced and violated rights and interests. In acting thus the Council seemed to have laid down the rule that no member of the League of Nations is justified in seeking justice for itself to the prejudice of another member.

When the League of Nations after 1925 dealt with improvements to be made in Article 11, it did not allude to the lesson which the Graeco-Bulgarian incident taught. But there is no doubt that if the League of Nations wishes to be equal to the task which it is to accomplish in the service of peace it should not look upon these discussions in the Council as a mere incident. On the contrary, it should develop the principles there established.[3]

§ 3. The Further Development of Article 11 of the Covenant

Although the Covenant of the League of Nations still admits certain wars and does not succeed in realizing to the full extent the outlawry of war, it is

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op. cit.; "The Anti-War Pact," Foreign Policy Association (New York), Information Service, 1928, p. 35; the unsigned articles in the Contemporary Review, January, 1926, p. 39, and in the *Revue des Deux Mondes*, February 15, 1926, p. 909.

[1] *Op. cit.*, p. 218.

[2] *Annuaire de l'Institut de Droit International* (Lausanne, 1927), II, 698.

[3] Meanwhile the Council has again had an opportunity to deal with the problem of defensive war. At the time of the dispute between Bolivia and Paraguay, the president of the Council, on December 15, 1928, addressed to the involved governments two telegrams which contained the following phrase: "The Council wishes to emphasise the fact that in its experience it is most important to confine all military measures of a defensive character to those which cannot be regarded as aggressive against the other country, and which cannot involve the danger of the armed forces coming into contact, as this would lead to an aggravation of the situation, rendering more difficult the efforts at present being made for the maintenance of peace." *Journal Officiel*, January 1929, pp. 72, 73.

highly important that the League of Nations has the right either to interdict from time to time a war which is beginning, or to end by decree of armistice a war which has already broken out. Without doubt the Covenant offers certain possibilities here. The important goal which every peace policy should pursue is to develop them. In this respect Article 11 is important. Here it is stated that every war or threat of war, whether it affects the members of the League directly or indirectly, interests the entire League, and that the League should take the proper measures for safeguarding effectively the peace of the nations.

A. The liaison between Geneva and the capitals of the world

During the first years of its activity the League of Nations hardly dealt with the practical working of Article 11. The Graeco-Bulgarian incident first drew its attention to the importance of the speedy meeting of the Council for a prompt settlement of a dispute, and showed how essential it is that special facilities of transmission and of transit be accorded to the governments and to the secretariat of the League of Nations in case of danger of war, especially the use of wireless telegraphy and of messages enjoying priority. In a resolution of December 14, 1925,[1] the Council had decided to submit this question for study and examination to the "Advisory and technical committee on communications and transit" of the League. Several months later France, in the first session of the preparatory commission for the disarmament conference, and at the time of the discussions of questions Va and Vb presented by the Council to the commission, proposed in a detailed motion: "to suggest to the Council that methods or regulations should be investigated which would facilitate the meeting of the Council at very brief notice in case of war or threat of war." [2] This gave new emphasis to the work undertaken by the Council along the same lines, and in a resolution of the Council of September 4, 1926, a committee of the Council, supported by the technical commissions of the League of Nations, was charged with examining this question upon a broader basis "in order to assure for communications of interest to the League, at a time when its action is demanded or exercised in accordance with Articles 15 and 16 of the Covenant, all desirable speed and, in a period of trouble, all desirable security, not only as regards the calling together of the Council, but also as regards the relations of every kind between interested members of the League, the Council, the Secretary General and the missions which might be sent by the Council." [3]

On the initiative of the Council the organs of the League of Nations dealt

[1] *Journal Officiel de la Société des Nations*, February, 1926, p. 175.
[2] *Documents de la Commission préparatoire de la Conférence du Désarmement*, Série II, pp. 94, 108.
[3] *Commission consultative et technique des Communications et du Transit. Communications intéressant la Société des Nations en temps de crise*, 1927, VIII, 6, p. 1.

very thoroughly with the problem of the most speedy liaison to be established between Geneva and the capitals of the world. Consideration was given to the question of immediate special train service, of special airplanes, of connections with ocean steamers, of priority rights, etc. There have even been special appeals to the governments to institute in each country central offices and to take all other measures necessary for guaranteeing good connections in special emergencies. Finally it has been planned to give airplanes preference in matters pertaining to the League of Nations, to establish a special aviation field at Geneva, to establish a priority telegraph service, for example by means of a wireless station belonging to the League of Nations, and to speed the transmission of League messages as much as possible by sending them, in cases of special urgency, over several different routes which are to be established in advance. It is probable that definite results will soon be reached in these matters. In particular the Tenth Assembly, in a resolution of September 24, 1929, instructed the Secretary General to take steps for the immediate installation of a wireless station which in times of crisis will be under the exclusive control of the League of Nations.

Once the connections between Geneva and the capitals are assured and developed, once the calling together of the Council is only a matter of hours, and once the transmission of news from Geneva to any part of the world can be effected without any delay, all the objections against radical projects concerning the interpretation and development of Article 11 will become void. Then no government will have objections against making the beginning of a defensive war depend upon the decisions of the Council, the latter deciding upon the aggressor and giving the attacked state permission to defend itself, as an instrument of the League of Nations and in accord with the states which must mutually support it, against the aggressor.

B. The report of De Brouckère

In the French motion which we have just discussed and in which France sought in the first session of the preparatory commission for the disarmament commission, to advance the solution of the security problem, there was also the suggestion "to request the Council to study the methods or regulations tending to speed the elaboration of the decisions to be taken by the Council for putting into effect the obligations of the Covenant."[1] The commission appointed by the Council for the study of this problem named the Belgian delegate De Brouckère reporter.[2] In his memorandum[3] the latter developed very important ideas on Articles 11 and 16 of the Covenant. Relying upon this document, the committee of the Council, in several sessions, the last of which took place on March 15, 1927, established principles[4] which were

[1] *Documents*, Série II, pp. 94, 108. [2] *Idem*, Série III, p. 43. [3] *Idem*, pp. 93–105.
[4] *Journal Officiel*, July, 1927, pp. 832, 833; February, 1928, p. 125.

approved by the Assembly in its eighth session (September, 1927) and by the Council in its forty-eighth session (December, 1927), and which were likewise examined in the committee of arbitration and security.

In the report of De Brouckère, for the first time since the establishment of the League of Nations, the point of view is taken that in order to assure peace emphasis must be placed not upon the obligation of the League of Nations to apply sanctions against the aggressor, but upon the right which the Council has of taking measures necessary for avoiding armed conflicts.[1] This report stresses Article 11 and not Article 16. It is even declared there that the best preparation for the use of Article 16 is the procedure provided in Article 11. The committee of the Council has fully adopted this view.[2] Chamberlain also stressed it in the meeting of the Council of December 8, 1926.

We must bear in mind the previous development of the problem to understand the significance of this change. Article 11 of the Covenant, which gives the Council all powers "to take the measures necessary for the effective protection of peace," had been considered only secondarily in the discussions of the League of Nations. When the problem of security came up, all attention was fixed upon Article 16, which concerns juridical, economic and military measures to be used against a state which takes up arms and violates the Covenant. It was not yet realized that the efforts made by the League of Nations to prevent an armed conflict are much more important than the protection of an attacked state. It was attempted to secure the immediate application of military sanctions against the aggressor state in such a radical manner that there was obvious danger of a mistaken identification of the aggressor, and that there was no chance of settling peacefully a dispute which had already broken out, so that it could only be settled by a war of execution. This method has now been abandoned.

The principles established by the committee of the Council happily go so far as to give the Council important political powers which make a realization of its peace program possible. De Brouckère has rightly shown [3] that between the first act of hostility and the real beginning of a war there is ordinarily a rather long interval such as the supreme efforts of the League of Nations should try to utilize for the sake of peace.[4] That is why the report

[1] Cf. also Philipse, *Le rôle du Conseil de la Société des Nations dans le règlement pacifique des différends internationaux* (La Haye, 1928), p. 113.

[2] Cf. the remarks of Lord Robert Cecil, *Documents*, Série III, p. 72; also Rutgers in the Prague memorial of the committee of arbitration and security, *Documents*, Série VI, p. 152 (No. 170).

[3] *Documents*, Série III, pp. 102, 103.

[4] In this connection it should be emphasized that on the occasion of the conflict between Bolivia and Paraguay the Council, on December 15, 1928, sent the governments of the two states two telegrams which contained the following passage: "The Council wishes to emphasise the fact that in its experience it is most important to confine all military measures of a defensive character to those which cannot be regarded as aggressive against the other country, and which cannot involve the danger of the armed forces coming into contact, as this would lead to an aggravation of the situation, rendering more difficult the efforts at present being made for the maintenance of peace." *Journal Officiel de la Société des Nations*, January, 1929, pp. 72, 73.

of the committee of the Council insists that the Council may, when war threatens, recommend to the parties to abstain from certain movements of troops and mobilizations, to neutralize a certain zone, etc. Thus experts could be sent to the section to see if the recommendations have been carried out. If they have not, the Council may express its disapproval and may recommend "sanctions against the state which menaces the peace." The opinion was then unanimous that certain sanctions are admissible according to Article 11, paragraph 1, of the Covenant (but not according to Article 11, paragraph 2, for in such a case there is no menace of war),[1] even before the conditions provided by Article 16 have been fulfilled. Thus, it was pointed out, the Council can recommend states belonging to the League of Nations to recall their diplomatic representatives, or can employ economic measures, for instance, declining to approve loans. The possibility of fleet and air demonstrations was also envisaged. During the discussions of the commission of the Council, De Brouckère cited as an example of sanctions of this type the organization of a pacific blockade.[2] For the rest it was shown that it is impossible to enumerate completely the measures to be considered because all eventualities cannot be foreseen.

As for the value of these suggestions, it may certainly be said, in the words of the report of the committee of the Council: "The importance of preventive action under Articles 11 and 15 cannot be exaggerated." [3]

The report of De Brouckère surely represents a turning-point in the history of the League of Nations. In it we clearly see a reaction against the exaggerated importance which the Protocol of Geneva attached to sanctions. The League of Nations is reminded that its basic mission is to maintain the peace and that it is on a false track when it seeks to solve the problem of security by putting the use of sanctions in first place. In particular the remarks presented by the German Government on the subject of the agenda of the committee of arbitration and security are excellent.[4] They show that "it is important, in dealing with the problem of security, to concentrate on the crux of the question: the pacific settlement of all kinds of international disputes. If, instead of doing this, an attempt were made to take the outbreak of war and the provision of military sanctions as the point of departure, it would be like trying to build a house from the roof downwards. War cannot be prevented by preparing for a war against war, but only by removing its causes."

But despite the value of the report of De Brouckère, it must be realized that the celebrated Belgian scholar has not drawn all the consequences from his fundamental principle. Concerning the importance of sanctions, he still makes important concessions to the opinions which the League of Nations, especially the Protocol of Geneva, continues to uphold. Moreover

[1] Cf. the remarks of Titulesco, De Brouckère and Boncour. *Documents*, Série III, pp. 69, 70.
[2] *Idem*, p. 68. [3] *Idem*, p. 108. [4] *Documents*, Série VI, p. 178.

the idea that the League of Nations in its proper sphere should be the only body to watch over the vital interests of its members has not been recognized by him to the fullest extent. He insists far too much upon the sovereignty of the states.

Hence De Brouckère, in his proposals concerning Article 11, speaks only of "recommendations" which the Council of the League of Nations should make to the parties. On the other hand he refrains from speaking of "decisions." A local investigation in the territory of the interested states, undertaken according to the principles laid down by the commission, can take place only with the consent of the parties. This is comprehensible, for it is a question of official acts in the territory of a state belonging to the League of Nations. But for the rest there is no reason for sparing the sovereignty of each state. Lord Robert Cecil (Great Britain) admitted only "recommendations" to the parties, while Titulesco (Rumania) spoke of a "pretorian right" of the Council concerning all provisions to be made, according to the special aspects of the case in question. Boncour, too, would give the Council far-reaching rights on the basis of Article 11.[1] After long debates, the details of which, by a singular and unfortunate chance (probably because of the differences of opinion which arose), have not been published,[2] the committee, instituted by the Council, finally decided that the form in which the Council was to come in contact with the parties, according to Article 11,[3] should be a recommendation addressed to the parties by the members of the Council not interested in the dispute.

But it is clear that a recommendation of this kind hardly meets the meaning of Article 11. If it is a question whether peace can or cannot be maintained by the intervention of the League of Nations, the Covenant must be applied in all its force, and if there is no hesitation to apply Article 16, it is not clear why Article 11, much more important for peace, is interpreted in a sense so favorable for the maintenance of the sovereignty of the states, and why the Council is denied the right of decreeing a provisional order.

This criticism seems all the more justified since the committee instituted by the Council of the League of Nations has recognized in its rules on Article 11, as we have already shown, the right for members of the League to resort to naval demonstrations, to the recall of diplomatic representatives, etc. However, according to the exact tenor of Article 11, such a question might appear just as doubtful as the orders given to the parties. If the Council is able to recommend measures which the Covenant of the League of Nations does not in itself provide *before* the premises of Article 16 have been established, yet it must have at least the right to give the parties orders of a binding character—orders necessary for the maintenance of the peace and which, if fol-

[1] *Documents*, Série III, pp. 68–70.

[2] Cf. the memorandum of the League of Nations, A. 14, 1927, V (*Rapports et Résolutions concernant l'article 16 du Pacte*), p. 925 (No. 21).

[3] It is assumed that the dispute shall be treated according to Art. 11. If the settlement is envisaged according to Art. 15, the special provisions of this article are to be applied.

lowed, render the use of sanctions superfluous. But if the Council is refused the right of ordering the parties to demobilize their troops and to neutralize the frontier zone, then it may be questioned also whether it has the right to recommend sanctions. It is curious to see how promptly the British delegate Lord Robert Cecil declared himself ready to admit naval demonstrations, that is, measures of third parties against certain parties, although the Covenant does not make provision therefor. On the other hand Lord Robert Cecil denied the Council the right to give orders to the parties.

Without doubt those who admitted that the Council should address orders to the parties by virtue of Article 11 were confronted by a difficult problem. Under what form should the Council take such a decision? As Boncour stated in an excellent manner in the session of the committee of the Council, there can be no thought of admitting that a majority is sufficient for an order. As it is not a question of procedure, there is need of a unanimous decision.[1] But some members of the Council were of the opinion that in establishing unanimity the votes of the parties must be taken into account. But then, in case the Council were to give an order, the parties would be able to prevent the working out of an order at any time. The authors [2] have often maintained this thesis, that the parties should cast their votes whenever the Covenant does not expressly refuse them the right to vote. This point of view has been supported in particular by De Brouckère [3] and Lord Robert Cecil.[4] It was opposed, with good reason, in the opinion of the writer, by Paul Boncour.

Boncour reasoned as follows. The decision in this matter will be facilitated by a rule which has never been contested in the discussions of the Council, namely that unanimity should be established to the exclusion of the interested powers. When Lord Robert Cecil protested, Boncour continued by saying that it could never be tolerated that an interested party should obstruct a unanimous agreement. A procedure of this kind, he said, would make any decision on the part of the Council impossible. One of the two parties would always declare itself against a disposition of this kind. It would mean exposing the Council to an admission of impotence. Perhaps some jurists will have a different interpretation. But the exigencies of life are different.

Lord Robert Cecil replied as follows. He said that it is not quite clear what Paul Boncour was aiming at. But it would be of the greatest importance to have no differences of opinion on so important a question among the members of the commission.

As we have shown, a version of Article 11 which does not serve the cause of peace so well, was adopted, though in a prudent redaction. This does not

[1] *Documents*, Série III, p. 70.
[2] Cf. e.g., Gonsiorowski, *Société des Nations et Problème de la Paix* (Paris, 1927), I, 254; the contrary opinion is supported by Schücking-Wehberg, *Die Satzung des Völkerbundes* (2d ed.), pp. 327, 620.
[3] *Documents*, Série III, p. 68.
[4] *Idem*, pp. 68, 70.

preclude a new and broader interpretation of Article 11, especially since neither the Council nor the Assembly have the competence to interpret authoritatively the Covenant of the League of Nations.

There is another inconsistency in the report of De Brouckère and in the guiding principles of the committee of the Council relative to Article 11. They have not taken into account the lesson to be derived from the Graeco-Bulgarian incident. They have admitted defensive war without reservation. They limit the measures taken by the Council in virtue of Article 11 in case the hostilities have not yet begun. However, Boncour, in presenting the French motion on the question of security, during the first session of the preparatory commission for the disarmament conference, stated:[1]

"Amongst the decisions which the Council can take in case of a sudden outbreak of hostilities is to demand an immediate armistice. The precedent of the recent Graeco-Bulgarian dispute has proved how effective this measure can be *if it is taken with sufficient rapidity.*"

Of course when it is realized that Boncour has always been in favor of sanctions entering immediately into force, it is not to be supposed that he planned to have the Council decree an armistice after grave hostilities have actually broken out. At any rate these declarations were not interpreted in this sense, and the report of De Brouckère does not provide that after the beginning of a war it is still necessary to try to reestablish peace. It is all the more surprising since once De Brouckère said that history teaches us numerous examples in which an attack did not lead to war, either because the attacked state failed to offer resistance or because the mediatory efforts of third powers led to peace.[2]

Later the motions of the Germans before the committee of arbitration and security tried to fill the last-mentioned, important gap which we have noted in the report of De Brouckère.

C. The German proposals in the arbitration and security committee

The German motions presented to the arbitration and security committee on February 22, 1928, by the retired German Secretary of State, von Simson, had the following tenor:[3]

[1] *Documents*, Série II, p. 110.

[2] *Documents*, Série III, p. 100. The Protocol of Geneva (Art. 10, par. 2) and the Pact of Locarno (Art. 4, No. 3) have already provided that the Council should in certain cases prescribe an armistice. Cf. also Politis, *Documents*, Série VI, p. 138; Rolin-Jaequemyns, *Documents*, Série VII, p. 128; Unden, *Friedenswarte*, 1927, p. 80.

[3] The considerations developed by the German delegation in support of these suggestions may be summarized according to the excellent report of Baron Rolin-Jaequemyns (*Documents de la Commission Préparatoire de la Conférence du Désarmement*, Série VII, Geneva, 1928, p. 125) as follows:

"1. In order that the action of the Council of the League of Nations may be exercised with increasing effect in the pacific settlement of international disputes, provision must be made for measures which will prevent either party to the dispute from employing the delay involved by such intervention to modify the *status quo* improperly in its own interest. Accordingly 'conservatory measures' of a purely provisional character should be taken by the Council.

1. In case of a dispute being submitted to the Council, the States might undertake in advance to accept and execute provisional recommendations of the Council for the purpose of preventing any aggravation or extension of the dispute and impeding any measures which might be taken by the parties and which might have an unfavourable effect on the execution of the settlement to be proposed by the Council.

2. In case of a threat of war, the States might undertake in advance to accept and to execute the recommendations of the Council to the effect of maintaining or reestablishing the military *status quo* normally existing in time of peace.

3. In the case of hostilities of any kind having broken out without, in the Council's opinion, all possibilities of a pacific settlement having been exhausted, the States might undertake in advance to accept, on the Council's proposal, an armistice on land and sea and in the air, including especially the obligation, for the two parties in dispute, to withdraw any forces which might have penetrated into foreign territory and to respect the sovereignty of the other State.

4. The question should be considered whether the above obligations should be undertaken only in case of a unanimous vote of the Council (the votes of the parties in dispute not being counted), or whether a majority, simple or qualified, should suffice in the matter. Furthermore, it should be considered in what form the obligations would have to be drawn up in order to bring them into conformity with the Covenant.

5. These obligations might constitute the subject of an agreement or of a protocol which would be open for signature by all States Members and non-Members of the League of Nations, and which might come into force separately for the several continents in a way similar to that provided for in the draft Treaty of Mutual Assistance of 1923.

The most important motion for the development of the problem of security was that contained under number 3. Up to then the League of Nations had felt that after the opening of any hostilities there could no longer be a question of attempts on the part of the Council to maintain peace, and that the Council should rather restrict itself to determine the aggressor and to give to the states belonging to the League of Nations the necessary instructions concerning the measures to be taken in the economic or military field against an aggressor state. That is, after the cannons had spoken, there was no longer to be an opportunity for the League of Nations to take any steps for the speediest restoration of peace. Every measure was then deemed useless. The only aim was to defeat the aggressor state.

Now, however, it is very clear that even when, unfortunately, warlike conflicts have broken out, the League of Nations should still devote its prin-

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"2. In order to prevent a difference or dispute between States from leading to war between them, the Council of the League of Nations must be in a position to prevent the said States from making military preparations with this object, such preparations being of a nature to lead to war despite the pacific efforts of the responsible statesmen.

"3. The League of Nations must endeavour to stop armed conflicts, even when a state of war already exists, and this, not only in the case of a war waged in violation of the Covenant, but even in the case of a war not prohibited by the Covenant. Hence the first step to be considered must be an armistice, under clearly defined conditions.

"4. The possibility might be considered whether the Council, in the above-mentioned contingencies, should not take its decision by majority vote, simple or qualified, as otherwise it might be unable to take any action whatever.

"5. To increase the feeling of confidence, an essential factor in security, the measures proposed by the Council must be binding upon the parties, in virtue of a general treaty or of collective treaties open to signature by all States, including even those which are not Members of the League."

cipal attention to the means of preventing, localizing, and eventually of terminating the war with all speed. At the very moment when public opinion demands from it a supreme effort toward peace, the League of Nations should not declare itself powerless.

Here the German initiative made itself felt at Geneva. Drawing its logical consequence from the fundamental idea of De Brouckère, the German delegation at Geneva proposed that even after the opening of hostilities the Council should make a supreme effort to maintain peace.[1] The Council should therefore receive from all the states full powers to give to the two parties to the dispute the peremptory order to conclude an armistice and to evacuate territory already occupied.

We must realize the full importance of the German motion before we can do it complete justice. In future the military authorities are to be deprived of the right to decide whether military measures are to be continued. If the Council has the right to prescribe an armistice, the military authorities themselves should after the opening of hostilities submit to the superior orders of the Council of the League of Nations. To hasten the opening of hostilities in order to be assured of strategic advantages will no longer be advantageous. For the Council of the League of Nations and not the interested state will henceforth decide whether hostilities are to be continued.

It should be expressly recognized that the German proposals under 1 and 2 are also very important. But the idea that the Council must take all steps in accordance with Article 11 for the prevention of hostilities had often been discussed. Yet the idea that these efforts must be continued earnestly even after the beginning of hostilities had not been stressed at all.

At the start the German proposals were rejected only by the British representative Cushendun.[2] He felt that the maintenance of the peace *status quo* would tend to strengthen the position of the party which already before the beginning of hostilities had distributed troops along the frontier. But Poland[3] and France[4] were well disposed toward the German motion, indeed they advocated at the same time an international control for agreements. The Netherlands[5] and Sweden[6] too supported the German motion. At the conclusion of the second session the arbitration and security committee instructed the Belgian member Baron Rolin-Jaequemyns to make a report on the German motion.

If the German motion was accepted, though with a few modifications, in the third session of the arbitration and security committee (June–July, 1928), this is chiefly due to the intelligent manner in which Baron Rolin-Jaequemyns interpreted the motion in his report.[7] To be sure, this report

[1] Cf. also the resolution of the Ninth Assembly concerning Arts. 10, 11 and 16 of the Covenant, wherein it is stated that "the League of Nations should act to prevent hostilities or in a given case to stop them when they have already broken out."

[2] *Documents*, Série VI, pp. 101, 102. [3] *Idem*, pp. 19, 104.

[4] *Idem*, pp. 23, 102. [5] *Idem*, p. 39. [6] *Idem*, p. 33.

[7] *Documents*, Série VII, p. 124.

could not prevent the Italian[1] and Japanese[2] delegates in the third session of the committee from declaring their opposition to the German proposals. But the opposition of the British delegate Cushendun was now less pronounced.[3] The latter was now even willing to accept the decisive proposal under number 3 on condition that not an armistice but a general conclusion of hostilities be mentioned. At any rate the situation was still such that it was deemed better not to work out a general treaty open to the signature of all states, but rather a model treaty for those states which would be ready to conclude such an agreement.

The "model treaty for reinforcing the means of preventing war" drawn up by the committee of arbitration and security in its third session makes the following provisions. In Article 1 the High Contracting Parties agree, in case a difference arises between them and the Council of the League of Nations is entrusted with it, to accept and to execute the provisional recommendations of the Council pertaining to the subject of the dispute and tending to prevent all measures on the part of the parties which would have a harmful effect upon the execution of an arrangement to be proposed by the Council. In Article 2 the parties agree to abstain from all measures tending to aggravate or extend the difference in the eventualities foreseen in Article 1. In case hostilities of any nature have already begun without the possibilities of a pacific settlement being exhausted, in the opinion of the Council, the parties agree, in accordance with Article 3, to conform to the recommendations which the Council may make for the cessation of hostilities, by prescribing the withdrawal of troops which may have entered the territory of the other state or a zone demilitarized by virtue of international treaties, and in general by inviting them to honor their respective sovereignties as well as the obligations assumed regarding the demilitarized zones. According to Article 4, the parties between which hostilities have arisen agree to carry out any action which the Council may decide for the observation and execution of measures which it may have recommended in agreement with Article 3. The question whether the votes of the parties to the dispute count in determining unanimity is decided in Article 5 of the proposal, only for cases covered by Articles 3 and 4, and that in a negative sense. The second German suggestion by virtue of which the states, in case of threatening war, would be bound to accept and carry out the recommendations of the Council with a view to the maintenance or reestablishment of the normal military *status quo* in time of peace has not been accepted by the arbitration and security committee, so that a provision to this effect is missing in the model treaty.[4]

The Ninth Assembly, in its resolution of September 20, 1928, recognized that the signing of a treaty, such as the model worked out by the committee

[1] *Documents*, Série VII, pp. 25, 38. [2] *Idem*, p. 34. [3] *Idem*, p. 37.
[4] On the details cf. especially the comments of the arbitration and security committee. *Documents*, Série VII, p. 122 ff.

of arbitration and security, would increase the guaranties of peace. Hence it recommended to the members of the League of Nations the examination of the model treaty and expressed the hope that it might serve as a useful basis for states wishing to conclude a treaty of this type. The Assembly did not hear another reading of the individual provisions of the model treaty.

The ideas underlying the model treaty were for the time being not followed up after the Ninth Assembly, especially not by the Germans. But in the Tenth Assembly (1929) the problem was again discussed. After Hymans (Belgium) in the sixth plenary session had drawn the attention of the delegates to the model treaty, the British Secretary of State, Henderson, in the seventh plenary session, recommended renewed study of this question. He did not believe that it would be possible to conclude a treaty exactly in accordance with the proposals and recommended that the third commission of the Assembly should make the necessary changes in the model treaty and should then transmit it to the governments for a final examination in the form of a general agreement, so that they could accept it in the next Assembly and sign it.

But the Tenth Assembly refrained from drawing up a general treaty of this kind. In its resolution of September 24, 1929, it merely acknowledged that the assumption of the obligations contained in the model treaty by as great a number of states as possible would make easier the maintenance of peace. It also invited the Council to instruct the arbitration and security committee to work out a general treaty which could be presented to the governments for acceptance in the Eleventh Assembly.[1]

[1] The 27th World Peace Congress at Athens (October 6–10, 1929) adopted the following resolution on an "immediate and obligatory armistice":

The 27th World Peace Congress, on the basis of a report of M. Spiropoulos, takes note of the plan of the "model treaty for fortifying the means of preventing war" which was drawn up by the committee for arbitration and security on the basis of German proposals and which was accepted by the Ninth Assembly of the League of Nations. At the same time the Congress favors the acceptance of the modifications which the reporters deem necessary in this text.

This draft of a model treaty does not meet the requirements of peace. Nor does it meet the actual ambiguous obligations which were entered at the time of the signing of the Covenant of the League of Nations in Articles 10 and 11. But moreover it represents a step backward with regard to certain precedents. Under these circumstances the Congress adopts the following resolution:

1. The Principle of Armistice. Considering that the foremost goal of the League of Nations is the maintenance of peace and not the determination of the aggressor nor the application of financial, economic and military sanctions, which up to now have attracted most of its attention and brought about its decree concerning an armistice;

Considering especially that Article 10 of the Covenant of the League of Nations states that the members undertake to observe the territorial inviolability and the existing political independence of all members of the League and to protect them from every external attack; and that in case of an attack, danger of an attack or threat of attack the Council considers the means for carrying out this obligation;

Therefore the 27th World Peace Congress is of the opinion that in the case of an armed conflict the first step of the League of Nations shall always be the proclamation of an immediate and obligatory armistice, which must be prescribed by the Council to all states engaged in an armed conflict or waging war, and which must contain the order to withdraw the troops at least to the line of the national frontier.

The Congress emphasizes also that this method has only advantages. For if the belligerent or armed powers obey the orders of the Council and observe the armistice

It is fortunate that the League of Nations did not permit the great idea underlying the German proposal to be forgotten and is willing to pay renewed attention to it.

VII. THE KELLOGG PLAN FOR A WORLD PEACE PACT

§ 1. Briand's Message to America

Through the efforts of the American peace movement and the labors of the League of Nations the idea of the outlawry of war has gradually become popular and has passed the first stage of world politics. It has become more and more the subject of private and official suggestions. Just as before the war the idea of arbitration was the great governing principle which was to

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the warlike acts automatically cease and the state of peace is restored. If however one of these powers refuses to obey the order of the Council and continues engaging in hostile acts, then the fact that it refuses to accept the armistice helps to determine which side is the aggressor. In this way the decisive criterion which the League of Nations seeks is given.

2. The Legal Question. Considering that the Fifth Assembly (1924) unanimously adopted the Protocol for the Pacific Settlement of International Disputes, Article 10, paragraph 5, of which obliges the Council to prescribe an armistice to the belligerent powers;

Considering that thus the Assembly gave itself the right to impose upon the Council the obligation of decreeing an armistice, thus recognizing that the states which are in a situation of armed conflict are obliged to accept such a decree by virtue of the fact that they have signed and ratified the Covenant of the League of Nations;

Therefore the 27th World Peace Congress states that the Assembly has the right to stipulate the general principle that the Council has the right to prescribe in special cases the application of an immediate obligatory armistice, without having to demand of the members that they bind themselves in this respect by new obligations, as the model treaty maintains.

3. Precedents. In point of fact the 27th World Peace Congress calls attention to the fact that the application of an immediate obligatory armistice has been recognized as a principle and carried out in several practical cases, especially in the conflict between Bulgaria and Greece in 1925, when the two states obeyed the appeal of the president of the Council and thereby gave the world a shining example of good faith with regard to the Covenant, of respect for the Council, and of devotion to the cause of peace.

4. Summarizing, the 27th World Peace Congress declares: Since the immediate obligatory armistice is the safest means to stop a war and to restore peace; since such an armistice represents the clear application of the principles and the observance of the obligations of the Covenant; since in law it was confirmed by unanimous vote in the Fifth Assembly and in fact by history; and since finally, in case of refusal by a power which is in an armed conflict or in a war, it offers the advantage of determining the aggressor; the Congress calls the attention of the League of Nations and of public opinion to the urgent necessity of decreeing an immediate and obligatory armistice without exception and reservation in all cases of armed conflicts and declarations of war, and of instructing the Council to determine the procedure for its application. (In a similar tenor the resolution of the General Assembly of the Association française pour la Société des Nations of December 15, 1929, *La Paix par le Droit*, January, 1930, pp. 37, 38.)

We may comment upon this resolution as follows. To be sure the statement that the right of the Council to decree an armistice follows from the Covenant itself, agrees with our own view here expressed, but it must be said that it is not correct to cite the Protocol of Geneva in this connection, because it is not a mere measure of execution but a development of the Covenant. But in view of the fact that the majority of states deny the Council that right on the basis of the general regulations of the Covenant (which is shown especially by the guiding principles of the committee of the Council of March 15, 1927, which were unanimously adopted by the Council and the Assembly), it seems politically more correct to advocate the conclusion of a separate treaty. Thereby the legal situation is made clear for the future, and by the discussion of the treaty the entire problem is set into livelier motion.

bring about the pacific organization of the states, just so attention is now directed more and more steadily to the outlawry of war.

A new impulse was given to this movement by the message which the French Minister of Foreign Affairs, Briand, addressed to the American people on April 6, 1927, through the Associated Press. Here Briand stated among other things:[1]

For him who is attached to this living reality of a policy of peace, the United States and France already appear in the world as morally solidary. If it were necessary to give still loftier testimony in favor of peace between these two great democracies and to propose to the peoples a more solemn example, France would be ready to subscribe publicly with the United States to any mutual engagement tending to "outlaw war" between these two countries, as the American expression goes. The renunciation of war as an instrument of national policy is a conception already familiar to the signatories of the League of Nations and of the treaties of Locarno. Any engagement undertaken in the same spirit by the United States with regard to another nation, such as France, would contribute greatly in the eyes of the world to broadening and strengthening the basis upon which an international peace policy is built. Thus two great friendly nations equally devoted to the cause of peace would furnish the world the best illustration of the truth that the most immediate consummation to be expected is not so much disarmament as the practise of peace.

This message found a strong echo in America. One of the leaders of public opinion, Nicholas Murray Butler, supported the suggestions of M. Briand a few days later in the New York Times of April 25, 1927. He wrote:

M. Briand's mind is thoroughly practical. He does not ask the Government of the United States to accept the Covenant of the League of Nations; he does not ask the Government of the United States to adhere to the protocol for the establishment of a Permanent Court of International Justice. All that he asks is that the people of the United States shall take their own way to express the fact that in no case will they employ war to enforce their policies with reference to France.

The echo which the Briand message found among the people of the United States encouraged the French minister to take another step. On June 9, 1927, he handed to Mr. Herrick, the ambassador of the United States, the "draft of a pact of perpetual peace between France and the United States of America." The first two articles of this draft had the following tenor:

Article 1. The high contracting powers solemnly declare, in the name of the French people and the people of United States of America, that they condemn recourse to war and renounce it respectively as an instrument of their national policy towards each other.

Article 2. The settlement or the solution of all disputes or conflicts, of whatever nature or of whatever origin they may be, which may arise between France and the United States of America, shall never be sought by either side except by pacific means.

§ 2. The Draft of Professor Shotwell

Before Briand had handed this draft to the American ambassador, Professor Shotwell in conjunction with Professor Chamberlain had worked out a

[1] *L'Esprit international*, Paris, July 1, 1927, p. 392.

"draft of a treaty for permanent peace," and published it late in May, 1927.[1] This private project, which found the same approbation throughout the world as had the former plan worked out by Shotwell in 1924, was planned in such a way that America could, on this basis, conclude a treaty not only with France but with all the non-American states.

Like the Pact of Locarno, the Shotwell project was to proscribe not only war but also all attack and invasion.

To this principle three exceptions were made. First, defensive war was declared admissible. But it was to be resorted to only in case the attacked nation had previously offered a pacific settlement of the dispute. In the second place, America was to preserve her freedom of action for any application of the Monroe doctrine on the American continent, on condition that she must previously have tried to settle the dispute by arbitration or mediation. Finally, a third exception provided sanctions against a state which had violated the law, but without prejudice to the terms of the treaty. In this case all the contracting parties would recover their freedom of action with regard to the party which had made itself guilty of a violation of the Covenant of the League of Nations.

Disputes between the parties were to be regulated by arbitration or mediation, unless they concerned a subject which in international law came under the internal jurisdiction of one of the parties. As regards the disputes just mentioned, their settlement by arms should however be proscribed in any case.

As for sanctions, it was provided that states which had violated the treaty were neither to be supported nor favored. But the question whether deliveries of arms coming from private sources should be included in this interdiction was not answered.

Hence the Shotwell draft was distinguished in three respects from the plan which Briand presented to America on June 9, 1927. In the first place it provided for the outlawry of war not only between France and the United States but between the latter and every other non-American Power. In the second place it contained definite exceptions to the interdiction of war. They corresponded in part to the reservations which were later adopted by the French in the exchange of notes between Briand and Kellogg. Finally, the draft did not pass over the question of sanctions in silence.

Shotwell did not go back in every respect to his draft of 1924. This time he refrained from defining the aggressor. He limited himself to an approval of defensive war in a single case, namely when the attacked party had previously offered a pacific settlement. The fact that he refrained from defining the aggressor signified no doubt an advance over the earlier project. But the definition of legitimate defensive war, based upon a doubtful inter-

[1] Information Service of the Foreign Policy Association, June 8, 1927; "*La Société des Nations*," *Revue mensuelle documentaire*, Berne, 1927, p. 627; *L'Esprit international*, July 1, 1927, p. 399; Advocate of Peace, Washington, July, 1927, p. 426; Shotwell, War as an Instrument of National Policy (London, 1929), p. 50.

pretation of Article 5 of the Locarno Pact, was just as unsatisfactory as had been the definition of offensive warfare. The decisive question, whether there was an attack, was not quite answered by such an arrangement as was proposed by Shotwell. Once there has been an attack, the dispute can hardly be settled merely by the initiative of the parties. In such a case a superior authority should have been provided which would intervene in the hostilities and which would, for example, have the right to order an armistice. At any rate it is interesting to note that the Shotwell draft did not authorize defensive war unconditionally because it recognized the dangers thereof.

As regards the pacific settlement of international disputes, the Shotwell draft signified an advance over the past, because in the draft of 1924 the decision of an international jurisdiction was provided only in case of violation of the obligations stipulated in the Covenant. On the contrary, Shotwell had this time created no special court of first instance for conflicts provoked by an aggression. It is possible that the reserved attitude adopted by Shotwell in this question is explained by the negative point of view which America has up to now taken with regard to the statutes of the Permanent Court of International Justice.

On the question of sanctions, Shotwell had left his former project practically unchanged. Participation in measures of constraint was not obligatory for the powers. But every contracting party had to agree "not to aid or support the power which had broken the treaty." The important idea that America, in case of an open attack, could not remain indifferent toward the aggressor, appeared in the proposals of Shotwell with just as much force as it did later in the suggestions presented by Senator Borah.[1]

Beside the draft of Shotwell there were published at the same time two private American drafts of a pact for the outlawry of war, that of the American Foundation [2] and that of the jurist Sayre.[3] Both planned essentially a very extended treaty of arbitration and mediation excluding all war. They did not provide for any sanctions.

Very different was the proposal of the American ambassador Houghton, who during a celebration at Harvard University on June 23, 1927, established the principle that in future it should not be permissible to address a declaration of war to another state, unless a popular referendum had produced a majority decision in favor of war.[4] This thought had already been injected into the discussion when the German Government on December 18, 1922, submitted to the French ambassador in Washington through Mr.

[1] New York Times, March 25, 1928.

[2] Draft of a Proposed General Treaty for the Pacific Settlement of International Disputes, The American Foundation, New York, 1927. The plan was published also in the Advocate of Peace, July, 1927, p. 423, and in "*La Société des Nations*," *Revue mensuelle documentaire*, Berne, 1927, p. 584.

[3] "*La Société des Nations*," *Revue mensuelle documentaire*, Berne, 1927, p. 593. Cf. also the Resolution of the American Arbitration Crusade, drawn up under the direction of Professor Borchard, *op. cit.*, p. 597.

[4] *Europäische Gespräche*, July, 1927, p. 379; Georg Bernhard, "*Doktoren des Krieges*," *Vossische Zeitung*, Berlin, July 24, 1927.

Hughes, the American Secretary of State, the suggestion that Germany was ready to make an agreement with France and the other powers interested in the Rhine (one of the Great Powers not interested in the Rhine acting as the trustee), that for a generation they would wage no war without a special popular referendum. The suggestion failed at that time, and when the discussions on the Rhine Pact were taken up in 1925 it was not considered. The idea of Houghton, it seems to us, belongs to a past epoch, for it is no longer a question of fixing the conditions whereby a state is to be permitted to wage war. The only problem is to determine the manner in which a war undertaken by a single state can be interdicted as quickly as possible, and to entrust to the League of Nations the defense of the vital interests of its members.

At any rate the proposal of Houghton shows again with what interest public opinion in America follows the Briand proposal and the extension of its principle to all international relations.

§ 3. The Preamble of the Recent American Arbitration Treaties

Before the further development of the negotiations between France and the United States on the pact for the outlawry of war can be discussed in its entirety, we must mention two successes which the movement for the outlawry of war achieved before the exchange of notes between Kellogg and Briand came to an end. In the first place a new "Franco-American treaty of arbitration" was signed on February 6, 1928, the treaty of arbitration concluded between America and France on February 10, 1908, having expired. In its preamble it contains a change which reminds one of Briand's proposal of June 9, 1927, addressed to the American ambassador Herrick. Paragraph 4 of the preamble of the Franco-American treaty of arbitration reads:[1]

> Eager by their example not only to demonstrate their condemnation of war as an instrument of national policy in their mutual relations, but also to hasten the time when the perfection of international arrangements for the pacific settlement of international disputes shall have eliminated forever the possibility of war among any of the Powers of the world.

Subsequently the United States concluded a certain number of other treaties with the same preamble, namely, one with Italy on April 19, 1928, and one with the German Reich on May 5, 1928.

The text of the preamble of these treaties proves that the idea of the outlawry of war has made new progress since the decision of the Eighth Assembly and that it is applied as well to the relations between states which are members as to the relations of those which are not members of the League of Nations.

[1] American Journal of International Law, 1928, Supplement, p. 37; *L'Esprit international*, April 1, 1928, p. 284.

§ 4. The Resolutions of the Sixth Pan American Conference

A second event which implies a success for the outlawry of war and which coincided with the exchange of the Briand-Kellogg notes, is the Sixth Pan American Conference. It took place at Habana from January 16 to February 20, 1928. Even while this conference was being prepared, suggestions were made looking toward the outlawry of war. In 1924, Mr. Hughes, the American Secretary of State, in order to prepare for the official discussions, asked the American Institute of International Law to work out projects which had been presented to the Fifth Pan American Conference at Santiago de Chile in 1923 and been examined by the commission of jurists which it had instituted. Hughes had taken the initiative for his proposal in his capacity as president of the directors of the Pan American Union, which in its session of January 2, 1924, expressed a wish to that effect. The suggestion was taken up by Mr. James Brown Scott, the president of the American Institute of International Law, with full understanding and enthusiasm. When in the summer of 1924 Scott went to Europe, he availed himself of this opportunity to meet in Paris with the distinguished Chilean jurist Alejandro Alvarez and the no less eminent scholar and statesman of Costa Rica, Luis Anderson, and to work out thirty projects which were adopted by the members of the American Institute of International Law at a meeting in Lima, Peru, in December, 1924. There were many changes made in them, and in February, 1925, they were revised by a commission of the same Institute at Habana. On March 2, 1925, they were transmitted to the Pan American Union.[1]

The thirty projects of the American Institute of International Law are very important for our investigation. We shall consider them for a moment. Although together they form a code of international law, they are composed of thirty individual drafts, formally independent of each other.

Draft No. 1 (Preamble) contains the basic principles of this attempt at a codification. It is stated first of all that after the World War a new epoch has begun in international life, characterized by the desire of the states to see how a permanent peace may be established among them, and how the bonds of confidence and of cooperation which are to unite them all may grow stronger. There is also an important reference to the fact that it is, in the opinion of the American Republics, essential for the maintenance of peace to study earnestly the causes of war, so as to prevent their origin if possible; that it is also important to base the international relations of the states upon justice by extending the rule of law step by step and by settling peacefully

[1] *Codification du Droit international américain. Projets de Convention préparés à la demande du Conseil Directeur de l'Union Pan-Américaine du 2 janvier 1924 pour être soumis à l'examen de la Commission internationale de Jurisconsultes et présentés par l'Institut américain de Droit international au Conseil Directeur de l'Union Pan-Américaine le 2 mars 1925*, Washington, 1925; *Codification de Droit international américain. Discours de Charles Evans Hughes, James Brown Scott, Elihu Root, Antonio Sanchez Bustamante y Sirven*, Washington, 1926; Bustamante y Sirven, *La Commission des Jurisconsultes de Rio de Janeiro et le Droit international* (Paris, 1928), pp. 66 ff.

at every opportunity those disputes which may arise between the nations, always with due respect to their independence, liberty and equality in law. Finally the preamble points out that the American Republics are more interested in the regulation of peace and neutrality among the nations than in war, because they have the hope that the latter has been happily and forever banished from the continent.

This preamble reveals the basic idea of all the drafts. The law of war, which before the war was in the center of all attempts at codification, was entirely eliminated from the very beginning. War is to have no place at all in the modern system of international society.

Project 3 is especially characteristic for the spirit of the whole work. It pays a warm tribute to the idea of Pan American unity and cooperation. The first part of this project has reference to a speech of Elihu Root, in which the principle of the inviolability of foreign territory and foreign sovereignty, as well as of the equality of the large and small powers is stressed. The second part, reverting also to a speech of Elihu Root, stresses the idea that there are no international disputes, however serious may be their nature, which cannot be settled peaceably.

In Project 4 we note particularly title 6 dealing with sanctions. There the military measures for the restoration of law are indirectly rejected. "The execution of the international law is entrusted in the first place to the honor of the American Republics, under the sanction of public opinion," we read in Article 20. Article 22 provides that the American Republics which have been directly injured by a violation of international law may turn to the Pan American Union so that the latter may bring about an exchange of opinions concerning the question. They may resort also to sanctions of a moral nature, such as an appeal to public opinion, the publication of public correspondence revealing the illicit actions of the state, a proposal for an arbitral settlement, and the rupture of diplomatic relations. Hence it may be assumed that measures of economic coercion are also proscribed, and this was actually the intention of the executive committee and of the members of the American Institute of International Law present in Lima. At any rate, in Project No. 29, such coercive measures, particularly measures of an economic nature, were regulated, which undoubtedly is a little blemish in the plan as a whole. The preamble of Project No. 29 merely states that the appeal to armed force shall be avoided in the regulation of disputes. Finally Article 21 of Project No. 4, which gives all the American Republics the right to protest against violations of international law, even if such violations do not affect them directly, is important. This expresses clearly the principle that the violation of legal order is not merely a matter between the violator and the violated state but a matter of concern for all states. For only if each state exercises its influence in the direction of opposing every injustice will the weak be able to rely upon their rights.

The important projects 7 and 8 shall also be considered here only from the

point of view of the outlawry of war. In this respect it is worthy of note that the "Declaration of Rights and Duties of Nations" (Project No. 7) under No. 1 emphasizes that "a state should never commit unjust acts against innocent states which have done no evil, for the sake of protecting itself or of maintaining its existence." Here too we find the principle that the causes of war, injustice against other states, must be eliminated. Among the fundamental rights of the American Republics (Project No. 8) there is in Article 1, No. 3, a renunciation of the so-called military occupation of foreign territory. It is stated there that no state may for any reason, directly or indirectly, nor even temporarily, occupy any part of the territory of an American Republic with the intention of exercising there any acts of sovereignty, even if the consent of the Republic in question is secured. Here an important thought is expressed, which is not recognized even in the Kellogg Pact. Article 2 of the same project stresses again what was stressed in Article 21 of Project 4, namely, the idea of the solidarity of Pan America with regard to any violation of the rights of an American state. Any threat of war and any violation of law may be brought to the attention of the Pan American Union by an American Republic.

Projects 11, 27 and 28 are dedicated especially to the pacific settlement of international disputes. The first-mentioned draft seeks to regulate the rights and duties of the states in spheres not yet definitively limited. Project No. 27, dealing with the pacific settlement of disputes, is best characterized by the preamble, which stipulates that in order to maintain peace, upon which civilization depends, and in order to prevent the beginning of a war which may threaten them, the American Republics have agreed, for the settlement of all disputes which may arise between them and which cannot be settled by direct negotiation, to take the measures described in the agreement. The provision of Article 19 of Project No. 27, whereby in case of a serious threat to the peace each party may turn to the Pan American Union, also deserves mention. Project No. 28 deals with the Pan American Court of Justice. It need hardly be emphasized that we are opposed to the creation of a special international court of justice for America. At any rate it is worthy of note that this project provides for obligatory arbitration for almost all legal questions.

But in Project No. 30 the idea of the outlawry of war found its strongest expression. This project contains a declaration of renunciation of territorial acquisition by means of conquest and recognizes as a principle of American international law that in future no territorial acquisition shall take place to the prejudice of an American Republic by means of war, under threat of war, or by appeal to armed force; that hence territorial acquisitions which may take place through these means cannot be justified by virtue of such acquisition; that territorial acquisitions thus made in future are to be regarded null and void from the factual and the legal point of view. This idea is certainly not new. Like many other proposals contained in the thirty proj-

ects of the American Institute of International Law, it is taken from older proposals, especially from a resolution of the First Pan American Conference of 1889–1890. But it is greatly to the credit of the Institute that it revived the important idea of prohibiting the acquisition of foreign territory through war. Since the project prohibits the spoliation of land, it deprives powers eager for conquest of every incentive and cause for war. Thereby war is not directly outlawed, but it is made illusory as an actual means of settling a dispute.

Of course, like all human work, these drafts are not perfect. They contain no formal and direct outlawry of war and no detailed regulation for the pacific settlement of international disputes. In particular we miss in them a provision as to reparation for conquests of the past, which poison the political life of the present. But the positive value of these drafts for our question is nevertheless very great. This becomes especially clear when it is realized that the first draft of these projects was made before the Fifth Assembly and hence before the Geneva Protocol.

The authors of the memorable thirty projects, the most notable of whom, besides Alejandro Alvarez and Luis Anderson, was the American authority on international law, James Brown Scott, placed less emphasis upon a negative proscription of war. It was their intention, by eliminating the principal causes for war and by creating a pacific settlement, to make durable peace possible (Project No. 1). They turned against every injustice which might be the cause of wars (especially Project No. 7, I), emphasized that a violation of law concerns all states (Art. 21 of Project No. 4, and Art. 2 of Project No. 8), and that in given cases every state may turn to the Pan American Union (Art. 22 of Project No. 4; Art. 2 of Project No. 8; Art. 19 of Project No. 27; cf. also Art. 10 of Project No. 29). They declared furthermore, which is very important, that every acquisition of territory through war, threat of war or armed force is prohibited (Project No. 30). They considered not only war but also military occupation of foreign territory illicit (Art. 1, No. 3 of Project 8), and they even refrained from considering the possibility of a war of sanctions (Arts. 20 and 22 of Project No. 4). All disputes, they were firmly convinced, could be settled peaceably (projects 3, 11, 27 and 28).

The preparatory conference of jurists which took place at Rio de Janeiro from April 18 to May 20, 1927, elimated projects 1, 3, 7, 8, 11, 28, 29 and 30. The jurists eliminated also Article 20 of Project No. 4 and the preamble of Project No. 27. Thus the most important provisions pertaining to the problem of the outlawry of war contained in the projects of the American Institute of International Law were sacrificed. That is why the suggestions of the Institute pertaining to the outlawry of war exercised no decisive influence upon the negotiations of the Sixth Pan American Conference at Habana.[1]

[1] American Journal of International Law, 1927, p. 437; Bustamante, *op. cit.*, pp. 183 ff., 237 ff.

But the problem of the outlawry of war was too much in the center of world politics for the Sixth Pan American Conference to pass over it in complete silence. Upon motion of the Mexican delegation the following resolution was adopted:[1]

Considering that the American nations should always be inspired by a solid cooperation for justice and the general good;

That nothing is so opposed to this cooperation as the use of violence;

That there is no international controversy, however serious it may be, which cannot be peacefully arranged if the parties desire in reality to arrive at a pacific settlement;

That war of aggression constitutes an international crime against the human species,

The Sixth International Conference of American States resolves:

1. All aggression is considered illicit and as such is declared prohibited;

2. The American States will employ all pacific means to settle conflicts which may arise between them.

As the result of an exchange of opinions between Chile, Peru and the United States of America a resolution was also accepted in favor of obligatory arbitration. Within a year the American Republics were to meet in a special conference in order to cast in the form of a treaty the principle of obligatory arbitration.[2] In the preamble of this resolution it is stated that the American Republics wish to express their opinion to the effect that they condemn war as a means of national policy in their mutual relations. It is interesting that in this preamble war in general is condemned, just as in the original draft of Briand for a Franco-American peace pact and in the preamble of the Franco-American arbitration treaty of February 6, 1928. But in the detailed resolution which deals exclusively with the problem of the outlawry of war, only aggressive war is declared an international crime against the human species.

The preliminary labors and resolutions of the Sixth Pan American Conference, in connection with the resolutions of the Eighth Assembly of the League of Nations, prove that the demand for the outlawry of war has long transcended the bounds of a purely American movement and has become a central problem both within the League of Nations and in the Pan American movement.

§ 5. The Exchange of Notes between Kellogg and Briand

Meanwhile, on December 28, 1927, the exchange of notes between Kellogg and Briand concerning the plan for a peace pact had begun. It lasted for three months, and not less than six notes were exchanged[3] between the

[1] American Journal of International Law, 1928, pp. 356 ff. Alvarez, *Le Panaméricanisme et la Sixième Conférence Panaméricaine* (Paris, 1928), pp. 74 ff.; Urrutia, *Le Continent américain et le Droit international* (Paris, 1928), pp. 96 ff.; Whitton, *Revue générale du Droit international public*, Paris, 1929, pp. 24 ff.

[2] This conference convened in Washington with great success from December 10, 1928, to January 5, 1929. It worked out a Pan American treaty of arbitration as well as a treaty of conciliation. Cf. Proceedings of the International Conference of American States on Conciliation and Arbitration, Washington, 1929.

[3] Notes exchanged between France and the United States on the subject of a multilateral

American and the French Governments, without leading to a completely satisfactory agreement on the formulation of the pact. To be sure, the American suggestion that a treaty be concluded not only between France and the United States but between all the Great Powers and that adhesion thereto be left open to all the Powers, was finally accepted by the French.[1] But concerning the question whether "war" or only "aggressive war" was to be outlawed there was a difference of opinion to the very end.

In its second note of January 21, 1928, the French Government stated that an unconditional renunciation of war on the part of France toward the United States is desirable and feasible; but that in concluding a treaty with others France could not overlook the fact that she is bound by the obligations of the Covenant of the League of Nations, the Pact of Locarno and other international obligations relative to guaranties of neutrality.

The United States in its third note of February 27, 1928, pointed out that if the existing obligations made it possible for France to conclude an unconditional treaty with the United States, it is not clear why France could not sign a similar treaty with all the Great Powers. The difference between a bilateral and a multilateral treaty containing an unconditional renunciation of war as a means of national policy is only "a difference of degree, but not a factual difference." The provisions of the Covenant of the League of Nations could not prevent the cooperation of the United States of America and the members of the League of Nations for the purpose of outlawing war. In the last Pan American Conference, too, war was unreservedly condemned as an instrument of national policy, although seventeen out of twenty-one of the states represented in Habana were members of the League of Nations. Finally Kellogg tried to explain why he regarded the unconditional renunciation of war as so important.

> I trust, therefore, that neither France nor any other member of the League of Nations will finally decide that an unequivocal and unqualified renunciation of war as an instrument of national policy either violates the specific obligations imposed by the Covenant or conflicts with the fundamental idea and purpose of the League of Nations. On the contrary, is it not entirely reasonable to conclude that a formal engagement of this character entered into by all of the principal powers, and ultimately, I trust, by the entire family of nations, would be a most effective instrument for promoting the great ideal of peace which the League itself has so closely at heart? If, however, such a declaration were accompanied by definitions of the word "aggressor" and by exceptions and qualifications stipulating when nations would be justified in going to war, its effect would be very greatly weakened and its positive value as a guaranty of peace virtually destroyed. The ideal which inspires the effort so sincerely and so hopefully put forward by your Government and mine is arresting and appealing just because of its purity and simplicity; and I cannot avoid the feeling that if governments

treaty for the renunciation of war. Washington, 1928; *L'Esprit international*, April 1, 1928, pp. 273 ff.

[1] At the beginning there was also a difference of opinion in that France urged that, although the treaty should be open to all other powers, it should for the present be signed only by France and the United States. But in the course of the correspondence France declared her willingness to have the treaty signed immediately by all the Great Powers.

should publicly acknowledge that they can only deal with this ideal in a technical spirit and must insist upon the adoption of reservations impairing, if not utterly destroying the true significance of their common endeavors, they would be in effect only recording their impotence, to the keen disappointment of mankind in general.

In its final reply of March 26, 1928, the French Government left to the United States the responsibility for the formulation of the treaty and declared itself ready to negotiate on the subject of a universal peace pact on the basis of the American proposal. But the French Government made three reservations. In the first place the treaty had to be based upon the full equality of rights of all the states, and not of special states. Hence the treaty was to be binding for a signatory power only if the states having serious disputes with other contracting parties signed the treaty, too. In the second place it is clear that in case one of the contractants should violate his obligations, the other contracting powers would be relieved of their obligations toward this state. Finally it had to be admitted, according to the declarations repeatedly made by Kellogg, that the renunciation of war did not exclude the right of legitimate self-defense. If the United States approved of the interpretation of these important points, the differences of opinion which had appeared up to then would have to be considered as inherent in the terms rather than in the reality of the problem. At the end of the note France declared herself in agreement with the American proposal to transmit to the British, German, Italian and Japanese Governments, for examination and opinion, the text of the initial Briand plan and the exchange of notes between France and the United States.

If we cast a glance at the notes exchanged between Briand and Kellogg, we will note with interest that in the negotiations between the United States and France there was discussed in the final analysis only the principle of the outlawry of war, with no control or sanction of the obligations being considered. Evidently this is explained by the fact that account was taken of the special attitude of America with regard to those problems repeatedly discussed by the League of Nations.

Although France had for the sake of the United States not touched upon a whole group of important questions, grave differences of opinion arose between Kellogg and Briand concerning the formula for the outlawry of war. As for these differences, America was certainly right, from the point of view of logic, in stating that if France was ready to conclude an unlimited arbitration treaty with America, she could sign a treaty of this kind with all the other powers of the world. But America overlooked the fact that even the original draft of Briand was not altogether in agreement with the Covenant of the League of Nations, and that only in view of the particularly warm friendship for the United States did France set aside her objections against an absolute renunciation of war. Naturally if it was a question of concluding a treaty with numerous states of the world, these obligations would have to be taken more seriously into consideration. Hence if between the

lines Kellogg reproached France with a certain lack of logic, he did not render justice to the distinguishing features of the original French proposal.

The central point in the discussions of Kellogg and Briand is ultimately to be found in the question whether there should be expressed in the treaty the reservations concerning which there were no irreducible differences of opinion, or whether it would be better to pass them over in silence, convinced that an absolute renunciation of war would turn public opinion in a quite different manner in the direction of peace. Regarding this question it should not be forgotten that the French Government was right in bending its chief effort to the necessity of expressing very openly in the treaty such important reservations as the legitimate character of the war of sanction and of defense.

If it is desired in future to admit certain wars, such as defensive war, then it is better, in the interest of good technique of treaty-making, to express this principle clearly in the convention. It is only when the nations realize exactly their obligations that they can be expected to cooperate in the creation of a durable peace.

A pact for the outlawry of war without reservations, with certain reservations tacitly admitted, would bind the parties no more securely than a treaty wherein the same reservations would be expressly stipulated. Moreover a treaty without reservations has the disadvantage of not presenting the true situation to the people and of causing serious disappointments. Finally it should not be forgotten that the progress of the movement will be better assured by a treaty, the limitations and gaps of which are clearly discernible, than by a solemn declaration creating the false impression that the great ideal of the complete outlawry of war had been achieved.

But it cannot be denied that in itself the effort of Kellogg to conclude the treaty in a manner as simple and intelligible to the masses as possible deserves the warmest approval. It may be asked, however, whether that could not have been done without omitting from the treaty the reservations acknowledged to be legitimate. For the clarity of the text of the interdiction should under no circumstances be obtained at the expense of an illusion inflicted upon public opinion.

Nor should it be overlooked that the question whether it is to be a renunciation of war or a renunciation of aggressive war does not exhaust all the important problems involved. The formula of Kellogg does not solve the question whether invasions or attacks upon foreign territory, as they have taken place several times since the World War, should be proscribed. If the renunciation is not to be extended to include acts of this kind, we shall in future witness the very dangerous practise of governments avoiding more cautiously than before the form of war and seeking to realize the same ends by non-military acts of violence. Happily it was stated in the French note of March 26, 1928, that the nations should agree "not to resort to any attack or invasion."

Finally it may be asked whether it is right to forbid war only as a means of national policy. This formula may give rise to the interpretation that war shall be permitted under certain conditions, for example as a means of "international" policy, as a means of asserting a religious dogma, a philosophy of life, or as a means of crushing the Soviet Union. Hence it would be better to renounce war in general and not only as an instrument of national policy.

Unfortunately this question and many others were not considered in the exchange of notes between France and the United States. The replies which the other powers made to the United States later, in April and May, 1928, also failed to touch these questions.

§ 6. The Attitude of the other Great Powers toward the Kellogg-Briand Exchange of Notes

On April 13, 1928, the Briand draft of June, 1927, the exchange of notes between Briand and Kellogg, and at the same time a new American draft of a pact for the outlawry of war were transmitted to the Governments of Germany, Great Britain, Italy and Japan through the ambassadors of the United States accredited to these Governments. The American Government also requested the Governments in question to come to a formal agreement among themselves on the question to what extent, if at all, the obligations resulting for them from existing treaties would prevent them from an unconditional renunciation of war in concert with the United States.

The American draft which was transmitted to the Great Powers agreed essentially with that of Briand of June, 1927, and had the following tenor:

> The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Exactly a week later, on April 20, 1928, France transmitted to the Great Powers a counter-project, Articles 1–5 of which had the following tenor:

> Article 1. The high contracting parties without any intention to infringe upon the exercise of their rights of legitimate self-defense within the framework of existing treaties, particularly when the violation of certain of the provisions of such treaties constitutes a hostile act, solemnly declare that they condemn recourse to war and renounce it as an instrument of national policy; that is to say, as an instrument of individual, spontaneous and independent political action taken on their own initiative and not action in respect of which they might become involved through the obligation of a treaty such as the Covenant of the League of Nations or any other treaty registered with the League of Nations. They undertake on these conditions not to attack or invade one another.
>
> Article 2. The settlement or solution of all disputes or conflicts, of whatever nature or origin, which might arise among the high contracting parties or between any two of them, shall never be sought on either side except by pacific methods.
>
> Article 3. In case one of the high contracting parties should contravene this treaty, the other contracting powers would *ipso facto* be released with respect to that party from their obligations under this treaty.

Article 4. The provisions of this treaty in no wise affect the rights and obligations of the contracting parties resulting from prior international agreements to which they are parties.

Article 5. The present treaty will be offered for the accession of all powers and will have no binding force until it has been generally accepted unless the signatory powers in accord with those that may accede hereto shall agree to decide that it shall come into effect regardless of certain abstentions.

The four Great Powers all replied favorably to the American question. The German reply of April 27 and the British reply of May 19, 1928, were quite detailed. Neither Germany nor Great Britain deemed it necessary to mention especially in the treaty the right of legitimate defense, since meanwhile the American Secretary of State had several times declared that the text did not exclude acts of legitimate defense. Nor did these two powers insist upon the universality of the treaty. Finally Germany and Great Britain agreed in deeming it unnecessary to insist especially upon the fact that the parties are relieved of their obligations with regard to a state which has violated the treaty. Concerning the French reservation on the obligations arising from the Covenant of the League of Nations and from the Pact of Locarno, the British point of view differed from the German point of view. Great Britain declared that the Covenant of the League of Nations and the Pact of Locarno go further than the renunciation of war when they provide for definite sanctions for the violation of their clauses. There might therefore be a conflict of interests between the existing treaties and the new Pact unless it were clearly stated that the obligations of the pact are not in force when a contracting party commits acts of hostility against a co-contractant of the pact. Great Britain declared that she would prefer the admission into the pact of a new clause comparable to Article 4 of the French draft. The German Government, on the other hand, held that war should be outlawed only as an instrument of "national" policy and that to accept such obligations is not in contradiction with the fulfillment of the obligations contained in the Covenant of the League of Nations and in the Pact of Locarno.

The British reply showed, curiously enough, that the integrity of certain territories presents a special interest for the peace and security of Great Britain. The English Government will not tolerate in the future as in the past an intervention in these territories. The protection thereof against attacks would be a measure of defense for Great Britain. Hence Great Britain could conclude the pact only if it does not limit the British freedom of action in these territories. As America has analogous interests, Great Britain felt that she was expressing by this attitude the opinions and intentions of the American Government.

After the submission of the new American draft to the Great Powers, a considerable number of governments expressed the official or unofficial desire to take part in the future final negotiations and eventually in the conclusion of the treaty. Upon the initiative of Chamberlain, the American Government, in a note of May 22, 1928, invited the British Dominions and India to join the Pact for the Outlawry of War as original signatory powers, and to

this invitation they replied favorably. In the middle of May, 1928, *L'Istvestija*, a journal very close to the Russian commissariat for foreign affairs, declared that the failure to ask the Russian Government to adhere to the Kellogg Peace Pact would be interpreted as an act directed against that government.

§ 7. The Kellogg Draft of a Treaty of June 23, 1928

The members of the League of Nations to which Secretary of State Kellogg sent a draft of the pact for the outlawry of war on April 13, 1928, considered for a while whether a commission of jurists should not be called together for the purpose of drawing up the pact in its final form. This intention appeared in the Italian note of May 4, 1928, addressed to the American ambassador at Rome. Here the wish is expressed that the American Government may take part in such a conference of jurists.

But this proposal for a conference of juridical experts met with opposition on the part of the United States. On June 23, 1928, the American Government presented to all the Great Powers, to the British Dominions and India, and to the signatory powers of the Pact of Locarno a final draft for a treaty. An attached note explained this draft more precisely and referred in particular to an address which Secretary Kellogg had delivered on April 28, 1928, before the American Society of International Law. The articles of the new treaty reproduced literally the original American draft of April 13, 1928. Only the preamble was expanded. Above all it recognized the principle that, if a state undertakes a war in future and violates the treaty, the other signatory powers will be freed from the obligations of the treaty with respect to that state.

In order to take into account as much as possible the objections of France concerning the universality of the treaty, the American Government declared itself ready to admit among the original signatories the states participating in the treaties of neutrality mentioned by the French Government. But it expressed the opinion that the interests of the states are sufficiently assured if instead of signing the treaty as original signatories they declare their readiness to adhere thereto.

In this form the treaty, to which all the interested powers had given their approval, was signed at Paris on August 27, 1928, by the representatives of the fifteen powers.

The same day on which the Kellogg Peace Pact was signed the United States of America invited all the governments which had not signed the treaty to adhere thereto. Upon this occasion the Government of the United States explained why the number of signatory states was limited. It was the desire to have the pact become effective as soon as possible. Too great a number of participants would have retarded prompt ratification. This invitation was also sent to Russia, which accepted it in a remarkable note of August 31, 1928. After recalling the Russian proposals in the

preparatory commission for the disarmament conference, the note declared that Russia had always favored the idea of the outlawry of war. But the Russian Government regarded the pact defective from several points of view. It demanded the outlawry of every kind of war and not merely the outlawry of war as an instrument of national policy. It stated that military occupations outside of war should also be renounced. It would likewise have preferred that the pact should prohibit the rupture of diplomatic relations. It protested against the reservations of Great Britain, which, according to the opinion of Russia, did not constitute an integral part of the Kellogg Pact. But in spite of these restrictions Russia declared herself ready to adhere to the Kellogg Pact.[1]

The Kellogg Pact came into force on July 24, 1929, after the Japanese ambassador had deposited in the State Department, five minutes before midnight of that day, the Japanese document of ratification, which alone was still missing. To the Japanese document of ratification there was attached another document wherein "the Imperial Government declares that the phrase 'in the name of their peoples' contained in Article 1 of the treaty for the outlawry of war signed in Paris on August 27, 1928, must be considered as inapplicable to Japan in the light of the provisions of the Imperial Constitution."[2]

At the time of the coming into force on July 24, 1929, the following states had adhered to the Kellogg Pact:

1. The fifteen signatory powers: Australia, Belgium, Canada, Czechoslovakia, France, the German Reich, Great Britain, India, Ireland, Italy, Japan, New Zealand, Poland, the South African Union and the United States of America;

2. The following thirty-one states which had been invited to adhere and had deposited their ratification documents in due time: Abyssinia, Afghanistan, Albania, Austria, Bulgaria, China, Cuba, Denmark, Egypt, Estonia, Finland, Guatemala, Hungary, Iceland, Latvia, Liberia, Lithuania, the Netherlands, Nicaragua, Norway, Panama, Peru, Portugal, Rumania, San Domingo, the Kingdom of the Serbs, Croats and Slovenes, Siam, the Soviet Union, Spain, Sweden and Turkey.

Later the following adhered: on July 25, 1929, Persia; on August 3, 1929,

[1] In this connection it should be stated that Russia has for a long time advocated the idea of a non-aggressive pact. The Russian proposals at the Conference of Genoa (1922) will be recalled. Russia has also tried during the last few years to conclude bilateral treaties of this kind with her neighbors. Thus non-aggressive and neutrality treaties were concluded with Germany, Turkey, Afghanistan, Persia and Lithuania. But the attempts to conclude similar treaties with Poland, Latvia, Estonia, Rumania, etc. failed.

Late in 1928 Russia proposed to Poland to let the pact for the outlawry of war come into force as soon as possible by a special protocol between Russia and Poland. The diplomacy of the Soviets took the position at that time that the Kellogg Pact would perhaps never come into force, or at any rate later than it did. The special protocol (Litvinoff Protocol) was signed on February 9, 1929, between the Soviet Union on the one hand, and Estonia, Latvia, Poland and Rumania on the other. Turkey, Persia, Lithuania and Danzig adhered. Cf. *Der Kampf der Sowjet-Union um den Frieden*, Berlin, 1929.

[2] *Europäische Gespräche*, August, 1929, p. 455.

Greece; on August 5, 1929, Honduras; on August 12, 1929, Chile; on August 24, 1929, Luxemburg; on September 11, 1929, Danzig;[1] on October 1, 1929, Costa Rica; on October 24, 1929, Venezuela; on November 26, 1929, Mexico; on December 2, 1929, Switzerland; and on December 4, 1929, Paraguay. Up to December 31, 1929, fifty-seven Powers have adhered to the Kellogg Pact.

Of the members of the League of Nations the following have not yet adhered to the Kellogg Pact: Argentina, Bolivia, Colombia, Haiti, Salvador and Uruguay. Among those not belonging to the League of Nations the following have adhered to the Kellogg Pact: Afghanistan, Costa Rica, Danzig, Egypt, Iceland, Mexico, the Soviet Union, Turkey and the United States of America. The following have adhered neither to the Covenant of the League of Nations nor to the Kellogg Pact: Brazil and Ecuador.

But all the aforementioned powers which have not adhered to the Kellogg Pact have declared their willingness to adhere thereto. Only Argentina and Brazil have left unanswered the invitation of the United States of America to adhere; Brazil, because it has incorporated the outlawry of war in its constitution, and Argentina, because of opposition to the interpretation of the Monroe Doctrine by the United States of America.[2]

§ 8. The Contents of the Kellogg Pact

A. Critique in general

Opinions are quite divided concerning the Kellogg Pact. Some see in it a great step forward. Others admit that while it has a certain importance because it adheres to the principle of universal peace, it is insufficient in its provisions.

How are we to explain the fact that while there is complete agreement on the historical importance of the Protocol of Geneva (1924) and the Pact of Locarno (1925), the opinions are quite divergent on the Kellogg Pact? Have not these three international documents this in common that they all outlaw aggressive war and provide a pacific settlement for all disputes? Indeed, at first glance the Kellogg Pact seems the most important of these treaties, since by virtue of its entire structure it is more universal than the rest. The Locarno Pact proscribes war of aggression only for the relations of Germany, France and Belgium. As for the Protocol of Geneva, it proscribes it essentially only for the members of the League of Nations.

Two circumstances have seriously harmed the Kellogg Pact in the eyes of the public. In the first place there are the numerous reservations which were expressly recognized in the American note attached to the draft. In the second place the Kellogg Pact fails to provide any settlement for the pacific procedure,[3] and no guarantee for the event of a violation of the law. Moreover, it dispenses almost completely with the regulation of details.

[1] Danzig had not been invited to adhere.

[2] Cf. *Revue de Droit international*, 1929, No. 3, pp. 269 ff.

[3] There is no special organ designated to intervene as a mediator in the name of the signatories of the Kellogg Pact in case of an international dispute. When in July and December, 1929, the United States of America and other powers called the attention of the two parties

As for reservations, there are undoubtedly a great number in the Protocol of Geneva and in the Locarno Pact, too. But so far as the Kellogg Pact is concerned, public opinion was stirred by the exchange of notes between the United States and France and paid more attention to the reservations than ordinarily. Thus the weaknesses of the treaty became clearer than its strong points. Moreover, the military sanctions of the League of Nations have always been considered as natural and absolutely necessary, so far as the Protocol of Geneva and the Pact of Locarno are concerned. But since that time public opinion has grown more skeptical with regard to a war of sanctions conducted by the League of Nations. It has been notably impressed by the criticisms directed against the automatic sanctions provided by the Protocol of Geneva. It inclines very much to seeing a weakness of the treaty in the concession which it makes by stipulating that in case the treaty is broken by one of the parties, the other parties will be free to employ the sanctions of the League of Nations.

But the Kellogg Pact is very important. For the first time it established the principle of the outlawry of all aggressive war in an international convention.[1] The Covenant of the League of Nations proscribes only certain wars. The states belonging to the League of Nations are free, unless there are special conventions to the contrary, to wage certain wars not prohibited by the Covenant of the League, in case, for instance, an attempt at mediation on the part of the Council has failed. A certain number of treaties of arbitration and mediation have increased the number of interdicted wars. Moreover, the Pact of Locarno has interdicted all aggressive warfare in the relations of Germany, France and Belgium. But in the relations of most of the members of the League of Nations only the imperfect provisions of the Covenant of the League of Nations prevailed prior to the signing of the Kellogg Pact. Finally those states which do not belong to the League of Nations used to have every liberty to wage war, unless there were special conventions on this point.

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in the Sino-Russian conflict to the Kellogg Pact, Russia declared that the Kellogg Pact does not provide that any of the signatories have the function of guardians of the Pact. Cf. *Europäische Gespräche*, November-December, 1929, pp. 630 ff. Consequently the press soon discussed a further development of the Kellogg Pact, whereby a commission of deliberation and conciliation was to be created to function as an organ of the Kellogg Pact. In the absence of such an organ the powers signing and adhering to the Kellogg Pact cannot be denied the moral right to call attention, at the time of a conflict, to the obligations arising from the Pact.

[1] Borchard (American Journal of International Law, 1929, pp. 117 ff.) feels that the Kellogg Pact, through the reservations recognized at the time of the exchange of notes, expressly approved of a considerable number of wars and for that reason signifies a step backward. But the wars which are admissible according to the Kellogg Pact were already admissible according to existing law, while the interdiction of all aggressive war makes the number of admissible wars considerably smaller. Nor should it be forgotten that the burden of proof is now on the other side. Formerly any war was in principle admissible, and when a state began a war it had to be proved that that war was interdicted. Now every aggressive war is proscribed. A state which wages war nevertheless must prove that one of the exceptional cases is involved which are recognized in the notes exchanged on the Kellogg Pact. To be sure, the present status is not perfect. But we must continue to build upon the foundation which now exists. Cf. also Verdross, *Friedenswarte*, 1930, March, pp. 65 ff.

For this reason the Kellogg Pact has a double significance from the juridical point of view. In the first place, it extends considerably the number of wars interdicted for members of the League of Nations. In future every war of aggression will be proscribed. In the second place, states not belonging to the League of Nations will be bound by the interdiction of aggressive warfare when they sign the Kellogg Pact or adhere thereto. There is a considerable progress achieved here, even though the treaty does not try to determine when there is a defensive war (permitted by the Pact), and although it gives no guarantee in case a war of aggression is undertaken in spite of the interdiction.

It is true that if the treaty is to attain the ends which it sets out to achieve, every state in the world must adhere to it. If this were not so, more than one state adhering to the treaty would, by the obligations imposed upon it by certain alliances, be too readily drawn into wars arising between powers not bound by the treaty.

But once the treaty has come into force for all states, the contracting parties can no longer one-sidedly escape the obligations assumed. For in contrast to the Covenant, the Kellogg Pact provides no possibility of withdrawal.

Aside from the juridical value of the Pact its moral value should not be underrated. In spite of all its imperfections it remains true that the treaty solemnly pronounces a basic principle. Aggressive warfare, which up to the time of the World War was universally admitted as a natural and permissible means whereto a state could resort for the solution of certain difficulties, is outlawed. The nation which undertakes a war of aggression is pronounced a criminal. In this way it is being recognized more and more that public opinion is an important factor of peace. This public opinion, based upon international morality and upon the interest of all humanity, can in the final analysis assure world peace better than can the military guaranties, the use of which would always be a two-edged sword likely to bring about the destruction of the League of Nations.

But in recognizing the merits of the treaty, let us not overlook its weaknesses. The latter must act as an incentive for us to do all in our power to make the outlawry of war perfect some day.

B. Interpretation in detail

We shall now undertake to interpret the Pact in all its details.[1] In the first place we must note that at no point does it expressly outlaw war. In the preamble, as in Article 1, we find only the declaration that the high con-

[1] The bibliography of the Kellogg Pact is given in detail by Lysen, *Le Pacte Kellogg* (Leyden, 1928), and in *Europäische Gespräche*, August, November, December, 1928; March, 1929, etc. See also the bibliography prefixed to the present monograph. Cf. Borchard, American Journal of International Law, 1929, pp. 116 ff.; Coffn, "*Kellogg-Vertrag und Völkerrecht*," *Zeitschrift für Völkerrecht*, XV, pp. 169 ff.; Colombos, "The Paris Pact otherwise called the Kellogg Pact," Transactions of the Grotius Society, vol. 14, pp. 87 ff.; Erich, "*Le*

tracting powers "condemn" war and "renounce" it as a means of national policy in their reciprocal relations. In the final analysis that amounts to outlawing war expressly. The only difference is in the fact that the terms "condemnation of war" and "renunciation of war" state clearly what the desideratum is, while the "outlawry of war" is hardly more than a catchword repeated by everyone. The parties renounce war as a means of national policy. At the same time they declare the violation of this interdiction a crime in international relations, and they "condemn" war. But they do not provide sanctions, and in particular they do not provide penalties in case of violation.

It may be asked—and the question is important—whether, when war has ceased to be a permissible means of settling international disputes, any rules concerning the conduct of war may be regarded as binding. In other words, are the Hague and Geneva Conventions concerning the adoption of more humanitarian procedure in case of war still in force after the ratification of the Kellogg Pact? In his work *Le Panaméricanisme et la Sixième Conférence Panaméricaine* [1] Alejandro Alvarez answers this question as follows:

> In future it cannot be demanded that a criminal act be done in accordance with law. The pirate and the thief are not bound by a code of laws in their depredations. If a powerful state wished to undertake a war of aggression, it would realize that it is committing a criminal act, but it would do so without being subject to any law. And there would be no means of preventing it, except the collective action of all the states against it.

At first glance this result seems monstrous. Is the cruelty of medieval warfare to be revived in the future? At the Paris Congress of the Interparliamentary Union in 1927, Walther Schücking with good reason spoke for the thesis [2] that the international code of the future should not contain a chapter on war and one on peace. Heemskerk, former minister of the Netherlands, asked whether that meant that the belligerent states would be free to use interdicted arms, to massacre prisoners, etc.[3]

We shall not answer this question here. But it is easy to show that many arguments can be adduced in favor of the Alvarez thesis. If international law proscribes war, it is difficult to admit that it should establish at the same time principles for its conduct in case it should break out nevertheless. The old rules of the law of warfare may claim a *moral* force even now. That

caractère juridique du Pacte de Paris," *Revue Sottile*, 1928, p. 232; Kunz, "*Der Kellogg-Pakt*," *Mitteilungen der Deutschen Gesellschaft fur Volkerrecht*, No. 9, 1929. pp. 75 ff.; Miller, The Peace Pact of Paris (New York, 1928); De Montluc, "*Le Pacte Briand-Kellogg*," *Revue Sottile*, 1928, pp. 334 ff.; Myers, Origin and Conclusion of the Paris Pact (Boston, 1929); Shotwell, "The Pact of Paris," International Conciliation, October, 1928; Shotwell, War as an Instrument of National Policy (New York, 1928); Strupp, *Der Kellogg-Pakt im Rahmen des Kriegsverhütungsrechts* (Leipzig, 1928); Wheeler-Bennett, Information on the Renunciation of War, 1927–1928 (London, 1928).

[1] Paris, 1928, p. 77; similarly Pella, *Interparlamentarisches Bulletin*, January, February, 1929. Cf. also Max Huber, *Blätter des Deutschen Roten Kreuzes*, January, 1929.

[2] *Union Interparlementaire. Compte rendu de la XXIV^e Conférence*, Lausanne, 1927, p. 466; see also Schücking in *Friedenswarte*, 1930, p. 50.

[3] *Idem*, p. 484. Cf. also Cohn, *op. cit.*, pp. 176 ff. and in the fifth session of the first commission of the Tenth Assembly; Kunz, *op. cit.*, pp. 83 ff.

much seems certain. Moreover, the fear that the opponent may resort to reprisals which are just as cruel will prompt each side to conduct the war as humanely as possible, if we may speak of humanity at all in this connection. But it may be asked whether the laws of war are to retain a *juridical* force.

It may be said that, after the ratification of the Kellogg Pact, war may as a rule be regarded as contrary to law only on the one side. So far as the other party is concerned, it will be permitted as a war of sanction or defense. But this consideration does not at all modify the reply to be given to the question which is being discussed. The laws of war apply either to both belligerents or to neither one. If the state violating the law must not commit its crime according to determined rules, the other party is likewise exempt from observing the laws of war. That is why the Hague and Geneva Conventions have no value even for war of sanction and defense. However, it is certain that the League of Nations should not conduct a war of execution with superfluous violence. It has the power of establishing principles whose application will prevent cruelty.

If the laws of war eventually lose their force, we should realize that it will come about not only as the result of the ratification of the Kellogg Pact. They will lose this force also for all wars proscribed by the Covenant of the League of Nations. On the other hand, in wars which are not proscribed even by the Kellogg Pact, the old principles of the laws of war must remain in force.

The ratification of the Kellogg Pact will have another consequence. In future, in case of a war of aggression committed by their state, the citizens of states which have ratified the Kellogg Pact will have the right to refuse military service. This will, in fact, be their duty, for international law has precedence over the law of the individual states. If international law makes war a crime, the citizens of a state should abstain from every participation in this crime. This interpretation should be admitted, if on no other grounds for the following reason. In Article 1 of the Kellogg Pact the high contracting parties declare that they renounce war "in the name of their respective peoples." In a certain measure the treaty is placed under the guarantee of the people themselves. Thus the people are under the obligation to strive with all their power for the realization of the ends pursued by the treaty. Conversely they should abstain from every act which may call forth a rupture of the treaty.[1]

Let us now examine which wars are proscribed by the Kellogg Pact. In order to answer this question, we must take the point of view that, in accordance with Article 1 of the Kellogg Pact, only "war" is proscribed, but not the military occupation of foreign territory nor other reprisals of a mili-

[1] Cf. Wehberg, *Das Genfer Protokoll* (Berlin, 1927), pp. 42 ff.; Politis, *Les nouvelles tendances du droit international* (Paris, 1927), p. 109; Mendelssohn Bartholdy, *Europäische Gespräche*, August, 1928, p. 405.

tary nature.[1] It is also provided that war is condemned only "as a means of national policy," which may be interpreted by saying that certain types of war do not come under the Kellogg Pact. We have in mind here, above all, war of sanction as a type of war undertaken "as a means of international policy." But war undertaken to support an ally could also be considered permissible, if we interpret Article 1 broadly. But it must be remembered that the members of the League of Nations should always observe the provisions of the Covenant. For the rest, these cases have been specially studied in the American note of June 23, 1928. Moreover, the opinion might be held that wars against nations of different religious or economic convictions, for example wars against the Soviet Republic, are not included in the interdiction of Article 1. But such an interpretation should not be taken seriously, since the Russian Soviet State has been permitted to adhere to the Pact.

There is also no doubt that America does not look upon disputes concerning the Monroe Doctrine as matters of purely national policy.[2] That is why, in the American view, a war undertaken for the realization of the Monroe Doctrine would not be included in the interdiction of Article 1 of the Pact. When in the British note of May 19, 1928, Chamberlain, announcing certain British claims, made a declaration which implied no doubt the acceptance of an American reservation in favor of the Monroe Doctrine, the United States remained silent. The American scholar C. G. Fenwick shows, in connection with the Kellogg Pact, that the Monroe Doctrine is contained implicitly in every treaty concluded by the United States.[3] In Article 21 the Covenant of the League of Nations admits a reservation in favor of the Monroe Doctrine. Since this is so, it will befit members of the League of Nations, in interpreting the Kellogg Pact and in case they have ratified it unconditionally, to respect the Monroe Doctrine.

The American note of June 23, 1928, admits a series of exceptions to the interdiction of war. These exceptions, excepting the war of sanction, are not expressly recognized in the treaty itself. As the other signatories of the Kellogg Pact have not protested against the tenor of the American note of June 23, 1928, the contracting parties have declared their implicit agreement with the American interpretation.[4]

There is mention, first of all, of the right of legitimate self-defense. By that we must understand the right "to defend one's territory against an attack or invasion," as it is stated in the American note of June 23, 1928. In an address before the House of Commons on July 31, 1928, the British Secretary of State Austen Chamberlain adhered to this opinion. The ques-

[1] Military occupation is not excluded by Art. 2 of the Kellogg Pact, whereby the settlement of disputes is to be achieved only by "pacific means." For the word "pacific" is here to be understood only as the opposite of "warlike." Cf. also Cohn, *op. cit.*, p. 174.

[2] To be sure, the prevailing opinion in America looks upon the Monroe Doctrine as an emanation of the right of self-defense. Cf. the report of Borah to the Senate, *Europäische Gespräche*, 1929, pp. 138 ff.

[3] American Journal of International Law, 1928, p. 828.

[4] Cf. Borchard, *op. cit.*, pp. 116 ff.; Marshall Brown, American Journal of International Law, 1929, pp. 347 ff.; Kunz, *op. cit.*, p. 90.

tion whether a case of legitimate defense exists should be decided by each signatory state.[1]

Are the colonies among those territories against which every attack may be warded off by military defense? This question may be answered in the affirmative. But there can be no defensive war when only spheres of interest are attacked. Yet Great Britain in her note of May 19, 1928, to the United States made the following statement, without being contradicted by the United States:[2]

> . . . there are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect.

Then Great Britain declared that this reservation was to a certain extent comparable with the American Monroe Doctrine. We can agree with this only to a limited extent. The British reservation is much less definite and does not apply to a clearly delimited geographical region.[3] This is a very dubious reservation, of a purely imperialistic nature, which diminishes the significance of the Kellogg Pact to a considerable degree.[4]

The second exception to the renunciation of war concerns war of sanction and other collective military measures of the League of Nations which may be taken for instance by virtue of Articles 10 and 16 of the Covenant. These articles can be invoked against a signatory of the Covenant only when that signatory undertakes a war in violation of Article 1 of the Kellogg Pact. It is expressly stated in the preamble of the Kellogg Pact that every signatory power which in future seeks to serve its national interests by recourse to war shall be deprived of the advantages of the treaty. According to the excellent remark of Professor Shotwell,[5] it is a question here of "cooperative defense," of the "defense of peace itself, and not of the defense of the national rights of a belligerent, whoever he may be."

Through the Kellogg Pact, the United States does not assume the juridical obligation to take part in the sanctions of the League of Nations. It only agrees not to consider sanctions of this kind, in the case mentioned, as a violation of the treaty. But America is *morally* obliged by the Kellogg Pact

[1] Cf. Verdross, *Friedenswarte*, March, 1930, pp. 65 ff.

[2] The objection of Russia does not modify this circumstance. It was made after the treaty had been signed and after the text was definitely established. Besides, notes of powers which are not among the signatory states should not be used for the interpretation of the treaty. As an adhering state Russia might make a reservation for herself personally, provided the other powers permit it. But such a reservation would have to be declared formally at the time of adhesion. Since that was not done, the objection of Russia in the note of August 31, 1928, has only a moral significance. The same is true of the similar declarations of Egypt, Turkey and Persia.

[3] Cf. Mendelssohn Bartholdy, *Europäische Gespräche*, August, 1928, p. 407; Scelle, *La Paix par le Droit*, October, 1928, p. 437.

[4] Cf. Cohn, *op. cit.*, p. 179.

[5] *L'Esprit international*, October 1, 1928, pp. 490, 491.

to treat differently a state belonging to the League of Nations which has violated the law, and states resorting to war of sanction according to the Covenant of the League of Nations. There is no doubt about that.[1]

The third exception concerns the guarantee of the obligations which have been contracted to support Article 16 of the Covenant, or better still, to do away with all wars of aggression. The treaties of Locarno deserve special consideration here.

Finally the obligations contracted by virtue of the treaties of neutrality endure, provided they are not in violation of the Covenant of the League of Nations. France has, for example, concluded such treaties with other states.[2] Let us imagine a case like the following. According to the treaties of Locarno, the settlement by arms of a dispute between Germany and Poland, to speak only of these two nations, is not prohibited in every case. In the Western Pact (Art. 2, No. 3) an action is declared expressly permitted if it is directed against a state which took the initiative in attacking, and if it is undertaken by virtue of Article 15, paragraph 7 of the Covenant. France and Poland have declared a treaty of alliance in case Germany should without provocation attack one of the two contracting powers. The American note of June 23, 1928, does not state that the obligations resulting from such alliances can still claim to have value. It merely demands that all parties to treaties of alliance of this type shall adhere to the Kellogg Pact. If this is the case, then the *casus foederis* can never ensue without the Kellogg Pact being at the same time violated and without all the contracting parties having free hand with respect to the aggressor.

Such is the complete enumeration of the exceptions provided by the Kellogg Pact. War is prohibited in particular also when a party refuses to carry out an arbitral award. The opposing party which has won the case has not the right to press its claims by resorting to arms. After the ratification of the Kellogg Pact the state is dependent more than ever upon the moral and political support of the League of Nations if it wishes to realize its claims.

It has already been emphasized that according to the preamble a signatory power which in future strives to promote its national interests by resorting to war shall be deprived of the advantages which this treaty affords it. The purpose thereof is to make it clear that the other states are automatically exempt from the obligations of the Kellogg Pact with regard to a state which wages war in violation of that Pact.[3] The legal situation is then the same as if the Kellogg Pact had not been concluded at all. But the obligations of the Covenant of the League of Nations remain intact. Of a different opinion is Cohn,[4] who argues: "War which according to the Covenant of the League of Nations was permissible is forbidden by the Kellogg Pact. If the state

[1] *L'Esprit international*, p. 492. Cf. also Quincy Wright, "The Future of Neutrality," International Conciliation (September, 1928), No. 242, p. 370.

[2] For members of the League of Nations it is understood that these obligations must not violate the Covenant of the League.

[3] Thus also the American note of June 23, 1928.

[4] *Op. cit.*, p. 174.

wages war nevertheless, it violates the provisions of the Kellogg Pact, and it can then no longer rely upon the provisions of the Covenant, which presuppose correct conduct on its part." Thereto we must reply: The decisive question is not whether the violator may appeal to the Covenant or not. For the interdiction of war exists, in the first place, in the interest of all. The question is therefore whether the members of the League of Nations are still bound by the provisions of the Covenant, and there is no reason to answer this question in the negative.

C. Kellogg Pact and Covenant of the League

a. The Negotiations of the Assembly

In the eighth plenary session of the Ninth Assembly of September 8, 1928, Woldemaras, the representative of Lithuania, proposed a resolution whereby the Council was requested to have an investigation made of the assimilation of the provisions of the Covenant of the League to the Kellogg Pact,[1] so that the next Assembly might pass a pertinent resolution. At that time the motion was considered premature, and it was not placed upon the agenda of the Assembly.[2]

In the Tenth Assembly the same idea was again taken up by Great Britain. In his great speech in the third plenary session on September 3, 1929, MacDonald announced that even when the Covenant was drawn up some of its provisions were antiquated, and that it was now time to revise Articles 12 and 15 of the Covenant. Several days later, on September 6, 1929, the British Secretary of State Henderson presented the following resolution to the Tenth Assembly:[3]

> The Tenth Assembly of the League of Nations:
>
> Notes with satisfaction the general adhesion of States Members of the League of Nations to the Pact signed in Paris on August 27th, 1928, imposing on its signatories the renunciation of war as an instrument of national policy and the undertaking to have recourse only to pacific means for the settlement of their disputes;
>
> Considers that, in order to take account of the progress thus made in the organization of peace, it is desirable to re-examine Article 12 and Article 15 of the Covenant of the League in order to determine whether it is necessary to make any modifications therein.

In the fifth session of the first commission of September 17, 1929, the British representative, Sir Cecil Hurst, presented carefully formulated proposals for modification which related not only to Articles 12 and 15, but also to Article 13. According to these proposals Articles 12, 13, and 15 were to read as follows:

[1] We shall not study the question of the influence of the Kellogg Pact upon other state treaties, for example the Convention for the Pacific Settlement of International Disputes, concluded at The Hague. Cf. G. Streit, *Quelques réflexions sur l'application du Pacte de Paris soumises au XXVII^e Congrès universel de la Paix* (Geneva, 1929).

[2] *Actes de la neuvième session ordinaire de l'Assemblée*, pp. 70, 91.

[3] Henderson stated that he was introducing his resolution also in the name of France, Italy, Belgium, Chile and Denmark, and that the German delegation, too, approved the proposal.

Art. 12, paragraph 1. All Members of the League agree to submit either to arbitration or judicial settlement or to enquiry by the Council a dispute arising between them which might lead to a rupture. They agree that they will in no case resort to war.

Art. 13, paragraph 4. The Members of the League agree that they will carry out in good faith any award or decision that may be rendered. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto.

Art. 15, paragraph 6. If the report of the Council is accepted unanimously by those of its Members who are not representatives of the parties, the Members of the League bind themselves to undertake nothing which is contrary to the proposals of the Council against that party which conforms to the proposals.

Art. 15, paragraph 7. If the Council fails to reach a report which is unanimously agreed to by the Members thereof other than the representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice other than a resort to war.

Even before this proposal was introduced, the representative of Peru, Cornejo, had announced a similar motion in the fifth plenary session of September 4, 1929, which he presented in the eleventh plenary session of September 10, 1929. This motion proposed that there be appointed a commission of five members which was to be instructed to report in what way the Kellogg Pact might be incorporated in the Covenant of the League of Nations, and what modifications would have to be made in the Covenant in order to render effective the interdiction of war as a means of national policy. While the British proposal called for an immediate solution of the problem by the Tenth Assembly, the Peruvian motion was content with the appointment of a commission to study the question.

The fact that the Peruvian motion was limited to the appointment of a commission was obviously due to the desire of Peru to modify not only Articles 12, 13, and 15 of the Covenant but the entire Covenant, so as to assimilate it to the provisions of the Kellogg Pact. In the fifth session of the first commission the representative of Peru named as particularly important questions which would have to be discussed from this point of view the interdiction of territorial expansion on the basis of war, the regulation of the laws of neutrality and the abolition of the principle of unanimity.[1] In the ninth plenary session of September 9, 1929, the German foreign minister Stresemann stressed the point that besides Articles 12 and 15, other provisions must be examined with a view to their agreement with the Kellogg Pact. He was probably thinking particularly of Article 19. In the fifth session of the first commission the delegate of the Netherlands, Limburg, called attention to the fact that eventually Article 17 might have to be revised too.[2]

Besides this difference of opinion concerning the extent of the revision of

[1] Cf. also the identical demand made by the 27th World Peace Congress at Athens (1929) in the resolution on the Kellogg Pact and the Covenant of the League of Nations: "Considering that in critical cases it is necessary to act quickly in order to reach an effective decision, a decision should be reached immediately and by a simple majority."

[2] Cf. also Van Hamel, *De Volkenbond*, December, 1929, pp. 69 ff.

the Covenant of the League there were other differences in the Tenth Assembly. Above all, the fact that an extension of the provisions of Articles 12 *et seq.* would bring about a broadening of the provisions of Article 16, aroused the opponents of military sanctions. In his key-note speech in opening the discussions of the fifth session of the first commission, Sir Cecil Hurst said that there would be only a "slight" extension of the obligations set down in Article 16. But in the same session the Danish representative Cohn replied that the result would be a "considerable" extension of the application of sanctions. He added that Denmark had always had certain scruples concerning the military sanctions of Article 16. In this he saw a remnant of the old laws of war. The military sanctions, he added, are not in harmony with the great principle of disarmament and maintenance of peace expressed in the Pact. Besides, the sanctions are not in keeping with the spirit of the Kellogg Pact. The Danish delegation deemed it undesirable to extend military sanctions, even in an indirect way. The Norwegian representative Raestad, in the identical session, expressed basic scruples of the same kind, but did not wish to oppose an extension of sanctions if this were undertaken after a thorough study. In the course of the same discussion the Swedish delegate, Marks von Württemberg, expressed the fear that the League of Nations is not strong enough actually to carry out the obligations set down in Article 16. He too, however, did not wish to raise any basic objections against the application of sanctions in all future proscribed wars, but he called for a careful study. Only the Danish representative, of all the representatives of the three Scandinavian powers, presented positive proposals, suggesting that there be added to the Covenant a new Article 17 *bis*, which was to recite the contents of the Kellogg Pact but was otherwise to leave the system contained in the Covenant as it is.

The three Scandinavian states were also agreed in the idea that the revision of the Covenant required an interpretation of the Kellogg Pact, and that this could not be effected without the participation of all the signatory Powers. This was rejected by Rolin Jaequemyns (Belgium), who said that the decisions of the Assembly had no force for non-members of the League.

Besides the Scandinavian states, the Netherlands also objected to an immediate decision. Upon this occasion the representative of the Netherlands, Limburg, called attention to the fact that it must be decided whether the difference between a unanimous report of the Council and one which is not unanimous is to be retained, as it now exists in Article 15.

The scruples set forth by the Scandinavian powers and by the Netherlands prompted the Tenth Assembly to refrain from an immediate decision on the British motion. Neither Sir Cecil Hurst (Great Britain) nor Rolin Jaequemyns (Belgium) were able to avert this decision through their spirited addresses. The first commission appointed a subcommission, which decided to recommend to the Council the appointment of a commission of eleven members to report on the question which changes would have to be made in the Covenant in

order to bring it into harmony with the Kellogg Pact. The commission was to meet during the first quarter of 1930 and to consider the replies and remarks which the members of the League might have submitted by that time. The report of the commission was to be submitted to the members of the League prior to the Eleventh Assembly. The twentieth plenary session of the Tenth Assembly of September 24, 1929, voted favorably upon the motion of the first commission.

b. Attitude toward the British Proposals

There is no doubt that the Covenant would have to be revised after the Kellogg Pact had come into force. Various speakers in the Tenth Assembly called attention to the fact that the Covenant must be intelligible to the man on the street. If the Covenant continued to permit aggressive warfare under certain conditions, public opinion would become suspicious of the League, and the Covenant would cease containing the basic thought of international peace and order. By an assimilation of the Covenant and the Kellogg Pact, Great Britain would have an opportunity at the same time to renounce, though tacitly, its reservation to the Kellogg Pact, since reservations are not permitted when the Covenant is changed, and since the British reservation would probably not be repeated.

If now there is the serious intention to revise the Covenant of the League in the sense of the Kellogg Pact, more earnest efforts should be made to render the process of revision clear. Article 26 of the Covenant, as we know, is not clear in several respects. For that reason the Second Assembly, after careful negotiations, decided upon modifications of Article 26, but they have not yet come into force because at the present time the ratifications of the German Reich, Spain and Persia are missing.

As for the contents of the modifications, the first question is whether the Covenant is to be amended in the broadest sense by taking into consideration the indirect influence of the Kellogg Pact upon all provisions of the Covenant, or whether, in accordance with the British proposal, only those provisions of the Covenant are to be changed which deal directly with the question of the outlawry of war. We believe that a limitation will be necessary for practical reasons, so as not to make the decision and the ratification of the necessary changes too difficult. The time is not yet ripe for a major revision of the Covenant. Moreover, the important questions connected with the pacific settlement of international disputes can, for the present at least, be better developed outside of the Covenant.

But to content oneself with a modification of those articles of the Covenant which concern the outlawry of war is not equivalent to being in agreement with the British proposal, which advocates a revision of Articles 12, 13 and 15 of the Covenant. The question of the extension of the field of sanctions is extremely important. Although for psychological reasons we should not reject military sanctions as a last resort, and although we are of the opinion

that in case we allow the military obligations arising from the Locarno Pact, etc., to stand, their extension through a general guarantee can only be in the interest of peace, yet we are of the opinion that these sanctions can be applied only after all pacific means at the disposal of the League of Nations have been exhausted. But a guarantee therefor is given only when the Council has the power to prescribe to the parties an armistice with binding force, as was explained in VI, § 3. Those states which oppose an overemphasis of the idea of sanctions should declare from the start that they will make their ratification of the modifications of the Covenant dependent upon the realization of the proposals made by Germany in the security committee, in accordance with the resolution of the Tenth Assembly. One cannot expect the states concerned for the peace of the world and for their own security to extend the field of sanctions and at the same time to witness the German proposals before the security committee remain mere paper proposals.

But even with this proviso the British proposals require careful examination. In the first place the new version of Article 12, paragraph 1, proposed by Great Britain does not seem entirely satisfactory because in the sentence "They agree that they will in no case resort to war" there may be found an approval of military occupations. Even the existing version of Article 12, paragraph 1, does not meet all requirements demanded by clearness and progressiveness. But the new version gives rise to even more serious scruples. It should be borne in mind that according to the now proposed text, as public opinion interprets it, military reprisals are prohibited three months after the award of the arbitrators or after the report of the Council, and that in the absence of the three months' period military reprisals seem to be permitted immediately after the award of the arbitrators or after the report of the Council. For that reason a different formulation would be preferable. In order to avoid all difficulties of interpretation, it would be best to adopt the Locarno formula and to say, "They agree to resort in no case to an attack or to an invasion or to a war."

Similarly this question would have to be settled in the newly proposed version of Article 15, paragraph 7, of the Covenant. The conclusion should read: "without however resorting to an attack or an invasion or a war." Otherwise, in case there were no unanimity on the report, military reprisals might be considered admissible. If this change is made in Article 15, paragraph 7, it is justifiable to retain the difference between a unanimous report of the Council and one which is not unanimously adopted. But the distinction would have no important significance. In the absence of unanimity on the part of the Council certain measures of a legal and economic nature could be taken which would not be permissible in case there were unanimity. But in order that such measures may be taken only by the parties to the dispute and not by all members of the League, it would be advantageous to change the words in Article 15, paragraph 7, "the *Members of the League* reserve to themselves the right to take such action as they shall consider necessary

for the maintenance of right and justice . . ." to "the *parties* reserve the right. . . ." In this way that interpretation of this provision would be recognized as official which takes away from members of the League not parties to the dispute the right to resort to measures permitted according to Article 15, paragraph 7.

Article 17 of the Covenant should not be modified, if for no other reason because the susceptibilities of non-members of the League might be unnecessarily offended thereby. At any rate there is no reason for decisive changes.

Let us hope that the modification of the Covenant of the League of Nations will soon take place in accordance with the principles here described.

PART II

DISCUSSIONS OF PRINCIPLE

I. THE OUTLAWRY OF WAR AND THE PROBLEM OF PEACE

§ 1. League of Nations and Outlawry of War

The outlawry of war is certainly the cardinal question dominating the whole problem of the organization of peace. If we are convinced that in the relations of the states, law should replace force to an ever increasing extent, then we must first of all interdict war considered as a means of settling disputes. War must be declared criminal. Recent history shows us such an abundance of decisions favorable to the outlawry of war that we may to-day look upon the general interdiction of war almost as an axiom. But it cannot be emphasized too strongly that the period of the Hague Conferences was still quite alien to such a requirement and that even when the League of Nations was created so far-reaching a step was not ventured upon.

An international organization whose essential purpose is the maintenance of peace cannot tolerate that its own members wage war among themselves. The present League of Nations will remain imperfect as long as the outlawry of war has not been established for all members in a form with binding legal force.

But however important is this need, it should not be thought that in interdicting war in general, the fundamental aim will have been accomplished. It requires an immense effort to make this interdiction real and to render it applicable to the practise of international life. The problem of peace is before all a moral and educational problem. So long as force is worshipped in many places, so long as the use of brutal arms for the purpose of pressing claims is not considered everywhere as an insult to international life, the interdiction of war will always be in danger of being violated.

§ 2. Arbitration and Outlawry of War

It is still possible for a pact on the outlawry of war to be violated because there are still a number of questions which the present governments are not ready to submit to obligatory arbitration. To be sure, there is reason to rejoice that so many treaties of arbitration and conciliation have been concluded in recent times. But we must not overlook the strong resistance to the signing of the optional clause on the statute of the Permanent Court of International Justice. The Protocol of Geneva, the arbitral system of which is certainly not without gaps, was rejected by Great Britain because its arbitral obligations were found to be too far-reaching. And as regards the

states not belonging to the League of Nations, even the most recent arbitration treaties concluded by the United States with France, Germany and others, exclude certain questions from arbitration. Even the American movement for the outlawry of war, as we have seen, does not call for unlimited arbitration. As for Russia, we know that in the conception of the Soviet Union there is no common standard for the judgment of the relations between Russia and the "bourgeois" states. That is why the settlement of international disputes by arbitration meets formidable resistance on the part of Russia.

The objections which most of the states raise against unlimited arbitration are to be ascribed to the fact that precisely for the solution of the most important problems no international juridical principles exist which have the force of law. That is why, in order to assure the triumph of the idea of the outlawry of war, international law must be codified at the same time.[1] The states should try, more than in the past, to solve the fundamental problems concerning international relations. They should in particular fill the gap contained in Article 15, paragraph 8, of the Covenant, whereby certain questions belong exclusively to the competence of the states and are excluded from mediation as provided by Article 15 of the Covenant.[2]

The progress of arbitral jurisdiction and that of the codification of international law are interrelated. On the one hand, the jurisdiction of the Permanent Court and that of the arbitral courts fill the gaps in international law to an ever greater extent. On the other hand, the codification of international law creates a better basis for the activity of the courts of arbitration and strengthens the tendency which the states show to submit their disputes to the principles of international law.

Only when the states are bound, after the failure of diplomatic negotiations, to settle their disputes in accordance with the principles of international law, will every danger be eliminated of seeing serious disputes arise as the result of differences of opinion concerning international questions. The interdiction of war, as important as it is, cannot be a complete guarantee of peace, so long as it is not established that the great disputes between the nations will be settled by virtue of an organized judicial procedure. No doubt there is already considerable progress in the fact that, in contrast to former conditions, all international disputes must be settled pacifically. But in default of a system of arbitration of universal validity, it is always possible that a mediation may not succeed in uniting the parties, and that a dispute may be perpetuated during the years and may lead to bitterness between the nations.

[1] Cf. Wehberg, "*L'état actuel des travaux de codification du droit international public en Europe et en Amérique*," *Annuaire de l'Institut de Droit international*, vol. 34 (Brussels, 1928), p. 708; also with notes in the *Revue de Droit international* (De Lapradelle-Politis), 1928, No. 3. See also *Zeitschrift für Volkerrecht*, XV, pp. 1 ff.

[2] Cf. Wehberg, "*Le Protocole de Genève*," *Recueil des Cours* (Académie de Droit international), VII (Paris, 1926), 78. The fact that the general act submits to arbitration disputes devolving upon the individual states is discussed in *Friedenswarte*, 1929, pp. 300 ff.

The question should then be examined whether it would not be possible for the states, pending the perfection of international law, to agree to entrust the settlement of political disputes which cannot be settled by mediation, to an impartial arbitral tribunal which will decide *ex aequo et bono*.[1] This means has already been resorted to in several treaties of arbitration and conciliation and in the more recent general act of the Ninth Assembly. Certainly this is not the ideal way. But it is a provisional solution which might prevail until all disputes can be settled by arbitration according to principles of law. A first modest step in this direction would be the approbation by all states, who are members of the League of Nations, of the special protocol appended to the statute of the Permanent Court of International Justice.

§ 3. Disarmament and Outlawry of War

At the end of its reply of April 27, 1928, to the American proposal for a pact for the outlawry of war, the German Government expressed the hope that the conclusion of a pact of such scope would not fail to exercise its influence upon international relations and would give an effective impulse in particular to the realization of universal disarmament. In a world which truly desires peace and which outlaws all war there is indeed no need of armaments. The latter are a sign of distrust. Their very existence proves that the relations of the nations are not yet characterized by that confidence without which any and all treaties are in danger of being violated.

Up to the present time, the League of Nations has dealt with the question of disarmament too cautiously. And yet the problem will continue to agitate the human race until radical disarmament has been realized. This alone can do away with war, provided, of course, that it can be achieved simultaneously and in the same manner by all the states.

In a League of Nations rid of the question of armaments, the problems of security and sanctions would be solved in the main. Once the states no longer maintain standing armies, frontier incidents may occur, but no wars of aggression. As long as there is only a limitation of numbers of troops and of military budgets, there will be insecurity, and the necessity of giving the states certain military guarantees will hamper international relations. If the governments are satisfied to limit their armaments uniformly but do not suppress them completely, the possibility of aggression remains as before. Undoubtedly competitive armaments imply more dangers than the maintenance of limited armaments does. But in case of a settlement of this kind the states must resort to security and sanctions. Only the complete elimination of armaments will solve this problem radically and completely.

It is claimed that a radical disarmament would be in contradiction to Article 8 of the Covenant of the League of Nations. We cannot deny that

[1] It is another question to what extent such an arbitral court might be authorized to judge in opposition to positive law. Cf. Wehberg in *Friedenswarte*, 1929, pp. 300 ff.

the exact tenor of Article 8 seems to confirm this opinion. But have not several attempts already been made to improve those articles of the Covenant which are not in harmony with advanced thought? Were the authors of the Protocol of Geneva deterred because the Covenant of the League of Nations permits certain wars? Certainly nothing would prevent a modification of Article 8 of the Covenant or a liberal interpretation thereof, once the conviction prevailed that a radical disarmament would serve peace better than a mere limitation of armaments.

The great importance of a radical disarmament for the idea of the outlawry of war can hardly be overemphasized. There may be doubt as to whether unlimited arbitration could be introduced and international law codified at this time. But if peace is earnestly desired, there should be agreement on two points, namely, that in an organized community of states whose supreme object is the maintenance of peace, war must be outlawed and armaments must be abolished in all the states.

§ 4. Security and Outlawry of War

If we consider the results which the preparatory commission for the disarmament conference has achieved up to now, we cannot be skeptical enough in regard to the progress of general disarmament. That is why it is necessary to consider the problem of security in the light of present-day Europe, which is not disarmed. Otherwise, the problem would be treated in an illusory manner.

The American movement for the outlawry of war believes that mere outlawry as an institution would suffice to give the states the necessary security. This is a fundamental error. Those who believe that mere outlawry is sufficient should be asked how they would assist an attacked state in case an international pact for the outlawry of war were violated. To say that a case of this kind would hardly ever occur after the outlawry of war has been established would not quiet the apprehensions of states which are concerned about their security. The problem of security will not be solved by proving theoretically that a state requires no security. After the dreadful experience of the Great War the fear of new aggression is quite justifiable. It exists in numerous states. This fear must be taken into account as a psychological factor, and it is absurd to reproach a state for being militaristic when it is concerned about its security so long as the other states are armed. Naturally, the armaments in question must always have a defensive character, and the interested governments must be ready to make the most far-reaching concessions to the idea of peace, if the security of armaments is to be replaced by a better guarantee of peace.

In spite of all the concessions which must be made to the need for security which many states feel, we must avoid attaching too much importance to the guarantees of security if we would witness the universal progress of peace.

If we overemphasize the means of military security, we arouse among the nations the idea that the international obligations which proscribe war are valueless. Nor should we expose ourselves to illusions and forget that in a community whose members still maintain armaments the security of each individual state is always relative. For this reason the states which are concerned about their security should with all possible emphasis put the problem of disarmament foremost among their policies. Let it be said once more: There is no more efficacious means of outlawing war in the true sense than by universal and complete disarmament on the part of all the states.

II. THE INTERDICTION OF WAR AND ITS SPECIAL ASPECTS

If we consider what has been done thus far for the outlawry of war, we realize how loudly the public opinion of the world is clamoring for the complete interdiction of war as a means for the settlement of international disputes, and how earnestly the governments are trying to meet this desire. The articles of the Covenant of the League of Nations, which outlaw only certain kinds of war, have been more or less overtaken by the recent development of the problem.

In our opinion this proves that the Paris Peace Conference committed an error in not proscribing war in the Covenant from the outset. We need but consider the contradiction involved here. According to Article 11 the Council of the League of Nations is to maintain peace in the entire world and has the right to take all measures suited to that end. On the other hand, the states are permitted to wage certain wars of aggression.

This defect must now be remedied. The Kellogg Pact is the first step in the right direction. An effort should now be made to express the principle of the outlawry of war in a universally intelligible form. Then the nations would have something to guide them in the future. Clear juridical obligations should be established. And in future treaties no tacit exceptions should be tolerated. If it is deemed necessary to stipulate certain reservations concerning the outlawry of war, it should be stated clearly, after the conclusion of the treaty, which wars will be tolerated. The public opinion of the world will then see clearly how the problem is to be attacked in the future and to be solved in a more perfect manner.

§ 1. War as a Means of "Policy"

The Kellogg Pact prohibits war only as a means of "national policy." As we have already stated, this formula seems hardly advisable. To limit the interdiction to certain wars which are enumerated is equivalent to saying that certain wars are still permissible. It might then be concluded from this phraseology that war is not interdicted as a means of "international policy." It must be admitted that under certain circumstances war is permissible as a means of realizing the international organization, and this is a question to

which we shall have to return. But as a means of "international policy" war is just as dangerous as it is when waged as a means of "national policy." Moreover, if it is maintained that war is to be interdicted only as a means of definite "policy," it may readily be justified by means which are not purely political. We call attention to wars of religion. If war is to be proscribed in the conviction that means superior to the use of military force exist for realizing political ends, then war ought to be renounced forever, without asking whether it be for means of national or international policy. A war for the destruction of Russia would be just as dangerous as a war which would aim to impose upon a state a certain political form, a social system, or the like. Wherever there are disputes between nations or within a single nation, they should be settled pacifically. At this point a radical difference appears between the states adhering to international law and Soviet Russia. The so-called bourgeois states take as their starting-point the idea of common spiritual and material relations between states equal before the law. Soviet Russia, on the other hand, considers itself as the first step on the road to world communism and is willing to attain this goal by military means, if necessary. If the states adhering to international law reject this point of view, they should say so unequivocally.

§ 2. The Peaceful Occupation of Foreign Territory

But it is not sufficient to outlaw only the idea of "war." According to current opinion, there is war when a state, by military means, resists an invading army. Yet the use of military means outside of war must also be interdicted. The military occupation of a foreign territory, what is known as "*occupatio pacifica*," and every invasion or attack of a territory belonging to a foreign state, represent means of violence which threaten in the gravest manner the pacific relations of the states and often provoke a war. After the Great War it occurred several times that powerful states did not shrink from using such means against other nations. But there would be no progress if it became customary to avoid studiously the form of war and to use other means of violence.

To justify a pacific occupation it is often said that such measures are demanded in the higher interests of peace itself. It must be admitted that force pressed into the service of law is a desirable thing. But we ask what law gives a state the right to decide for itself whether the means of violence which it has used are justified by the higher interests of the international community. A state can represent these higher interests only as an organ of the international community.[1] Hence this community alone can decide whether the individual state has the right to act as its organ. Within the League of Nations there is the Council, which decides the preliminary ques-

[1] Cf. in this sense the resolution of the 26th World Peace Congress at Warsaw (1928) concerning China. *Bulletin officiel de XXVI^e Congrès universel de la Paix*, Geneva, 1928, p. 134.

tion whether certain military measures should be used in the interests of peace. Each member state may turn to the Council for an opinion. The Council must decide whether it is advisable to use measures of constraint against any state for reasons of humanity, respect for law, or the like. The states not belonging to the League of Nations may turn to an impartial arbitral tribunal for a reply to such a question. No government should hesitate to decide objectively once for all whether the military occupation of a foreign country is really necessary for juridical reasons and for the maintenance of peace. Only then will it cease being suspected of selfish motives and of trying to obtain nationalistic advantages under the pretext of international interests.

The principle of the outlawry of war will lose a great deal of its significance if the states cannot decide, in accordance with Article 2 of the Pact of Locarno, to extend the interdiction of war to any invasion, attack and use of force. An individual state can defend its rights outside of its own territory only if it has received permission from the international community to do so.

§ 3. Defensive War

An important problem is involved in the question whether defensive war is permissible. In an international community which is not organized, defensive war may undoubtedly be admitted. As long as the community of states tolerates the overpowering of one state by another and, under the protection of treaties of peace, the appropriation of the territory of vanquished states and the imposition of enormous reparations, the governments which are attacked or menaced will have the tendency to consider defensive war as the only means of escaping the dangers of violence. The state which attacks and the international community which tolerates such an attack are responsible in the final analysis for the consequences resulting from the defense of the attacked state.

But while realizing that true war of defense serves the noblest ends of the protection of law, we must admit that it involves great dangers.

In many wars even neutral observers can scarcely determine definitely the aggressor. Such a demonstration will *a fortiori* be more difficult for the state which is a victim of a real or an imaginary attack and which finds itself in a state of extreme emotional tension. One of the most delicate problems which has been attacked in connection with the Covenant of the League of Nations is the establishment of principles by virtue of which a superior international instance may with the greatest celerity and accuracy determine the aggressor. Up to now no satisfactory solution has been found. In Article 4, the Locarno Pact has left it to the Council to examine who the aggressor is. It did not, like the Protocol of Geneva, establish general principles whereby the aggressor can be determined in a special case. The disadvantages of giving an attacked state the exclusive right of deciding for

itself whether it has been attacked are not realized. As if a state which is itself a party to the dispute were able to pronounce a judgment which can scarcely be pronounced by an international instance even when it has the most perfect competence and is inspired by the most rigorous spirit of justice!

Rarely has a state, determined to make an attack, openly acknowledged that it was availing itself of war in order to attain its purpose. The aggressor state has almost always pretended that it was waging a defensive war. In order practically to prevent a state from resorting to aggressive war under the pretext of defensive war, the attacked state must absolutely be deprived of the decision whether the war is one of aggression, and the decision must be left to the Council of the League of Nations or to some other international instance.[1] Here again the Pact of Locarno may serve as a model. For by virtue of Article 4, a defensive war may be undertaken only if the Council has previously decided that it is a war of aggression. The only exception is a case of flagrant violation.

This condition is perfectly justified. It will be more appreciated if it is remembered that in an organized international community it is not the individual state but the community which is competent to avert aggressions directed against members, whether these aggressions are committed by a member state or by a non-member state. Since every warlike conflict interests the international community vitally, and since every war may involve the members of the community, a war is always the concern of the entire community. Article 11, paragraph 1, of the Covenant, states clearly that every war or threat of war interests the entire League, regardless of whether it directly affects one of the members of the League or not.

Hence it is not the individual state but the League of Nations which should take the necessary measures for the maintenance of peace. Moreover, Article 11, paragraph 1, likewise makes this express statement. Defensive war undertaken by an individual state should therefore always be waged at the demand of the League of Nations. That is to say, defensive war should be permitted only as a war of sanction undertaken by delegation. In the present state of positive law, a state may tacitly assume the approbation of the Council when it wages a defensive war. There is a great danger in this. It is indispensable for the League of Nations to examine the entire situation before the defensive war begins.

This point of view must be taken for the good reason that even after the opening of hostilities pacific means can often lead to the desired result. The motion which the Germans presented to the committee on arbitration and security on the subject of the order which the Council can give to con-

[1] Art. 20 of the draft of a league of nations drawn up by the Deutsche Gesellschaft für Volkerrecht was much more progressive from this point of view than the Covenant. According to this plan, each state had the right to start a defensive war. But it was expected to notify the executive committee of its step immediately, and this committee was to have the final decision as to the justification of the step. Cf. *"Der Volkerbundsentwurf der Deutschen Gesellschaft fur Volkerrecht", Monographien zum Volkerbund, Deutsche Liga für Volkerbund*, no. 1 (Berlin, 1919), pp. 8, 60.

clude an armistice would hardly be intelligible if it were admitted that once war is begun the dispute can be terminated only by the defeat of one of the parties or by the exhaustion of both belligerents. In his celebrated report De Brouckère explained that history shows us numerous examples in which aggressions have not provoked war, either because the attacked state offered no resistance or because the mediation of a third party led to peace.[1] If this is the case, the League of Nations itself should, after the opening of hostilities, use all possible means to settle the dispute in some other manner. And then, thanks to this delay, the League of Nations will be able to act effectively in favor of peace.

It is an important idea for the future of the League of Nations, and one of the most important for the solution of the problem of the outlawry of war, that the League of Nations should strive to maintain peace even after the opening of hostilities and that the decision concerning the acts to follow should not be entrusted to the military. In a case of clear aggression the League of Nations has the right and the duty to aid the attacked party. In urgent cases it will be able to give the attacked party permission, within a few hours, to defend itself by military means. But it is an intolerable thought that the League of Nations may often be placed by a defensive war, which begins immediately and without authorization, in a situation which may render its intervention extremely difficult.

Defensive war can therefore be admitted in a pact for the outlawry of war only if a superior tribunal has established the reasons justifying the assumption that a war of aggression has broken out, and only if this tribunal has previously had the opportunity to intervene in the dispute at the last moment.[2] How long a period should be given to the League of Nations for

[1] *Documents*, Série III, p. 100.

[2] To what extent these views, championed by us for years in the *Friedenswarte* and elsewhere, are now beginning to assert themselves, is proved by the following. At the Berlin Interparliamentary Conference, Professor Van Embden (Amsterdam) declared (*Compte rendu de la XXV^e Conférence interparlementaire*, Lausanne, 1928, p. 461), "To-day it can no longer be left to the competence of the individual state to decide of its own accord that it has been attacked, that it is on the defensive, and that it may now set a part of the world on fire, with all the incalculable consequences and complications for the other nations. No, this right, if it exists at all, belongs only to the whole community. Only it has the right to sanction self-defense." In the League of Nations program of the Kiel democrats of 1929 (*Friedenswarte*, 1929, p. 147), whose author is Professor Walther Schücking, we read, "But considering that in history wars of aggression and prevention have always been represented by the governments as wars of defense, the party demands a speedy development of international law so that an unpartizan judicial instance is created to decide which state has disturbed the other in the quiet possession of its rights, and where there is a case of criminal attack or a case of defense." Professor Heinrich Rauchberg (Prague) in an article *Die Weltächtung des Krieges*, published in *Hochschulwissen* (1929), nos. 2/3, p. 7, writes, "The renunciation of aggressive war is of value only if an independent instance of the best reputation decides on the fact of the attack and the cause for defense." In the same tenor La Fontaine, Scelle and Spiropoulos (*Rapports au Congrès universel de la Paix d'Athènes, Bureau international de la Paix* (Geneva, 1929).

There is no doubt that such views ultimately lead to a complete rejection of the war of defense (in contrast to the war of sanctions), as the present writer has already tried to show in his works *Grundprobleme des Volkerbundes* (Berlin, 1926), pp. 73 ff.) and *Das Genfer Protokoll* (Berlin, 1927, pp. 49 ff.). This appears clearly in a lecture by Norman Angell on August 29, 1929, in a public demonstration of the Interparliamentary Union at Geneva (cf.

a mediatory action and for dictating an armistice? On this question opinion may be divided. In general it may be said that the special circumstances, as the superior tribunal sees them, should furnish the elements for the decision.

For the states belonging to the League of Nations it is easy to draw the consequences from this general principle, particularly because the connections between Geneva and the capitals of the world facilitate immediate summoning of the Council and render the efforts for the settlement of the dispute more likely to succeed. It is more difficult to create a superior instance capable of fixing the conditions of a defensive war for the relations existing between member states and non-member states of the League of Nations. But as we shall see, this point presents no insurmountable difficulties.

The settlement of the Graeco-Bulgarian dispute (1925) and of the difference between Bolivia and Paraguay (1928) is a practical model for the measures to be taken in such cases. For the success of the opinions expressed here, it is necessary above all that the peoples change their attitude toward the problem of war. More emphasis must be placed upon the necessity of transmitting to the League of Nations the protection of the vital interests of the states and of reinforcing the League in proportion as its functions increase.[1] That is the only way to restrict to a minimum the dangers resulting from defensive war considered as a legitimate instrument.

"*Union interparlementaire. La portée et les conséquences du Pacte de Paris du 27 août 1928*," Lausanne, 1929, p. 37; German translation in *Friedenswarte*, 1929, p. 297). The lecture by Norman Angell probably explains why on September 8, 1929, Count Albert Apponyi, who had taken part in the demonstration at Geneva, expressed the following thoughts, which, though they are not identical with our ideas, approximate them. They were made in the course of an address delivered at the University of Zurich. "Unfortunately," he said, "I must make a restrictive remark concerning the value of the Kellogg Pact, and this pertains to the reservations with which various powers accompanied their signature. In the first place, the right of defense against an aggression was generally recognized, and this is quite natural. But the danger lies in the right of each state to decide whether and when it has been attacked. It is clear that in this way free play is given to the fable of the wolf and the lamb, and that this otherwise legitimate reservation must be restricted by the proviso that the decision as to the fact of the aggression shall be made by a juridical instance."

In a report made soon after to the 27th World Peace Congress at Athens (1929) Professor Pella (Bucharest) advocated entrusting the decision on the justification of self-defense to an international organ, provided that the conditions for self-defense which this organ is to determine be previously formulated. Cf. also Madariaga, Disarmament (Oxford, 1929), p. 42, and the utterance of Lord Robert Cecil mentioned in the *Monatsschrift der Deutschen Liga für Volkerbund* (June-July, 1929, p. 37)—an utterance made on the occasion of the Madrid session of the associations for the League of Nations—"that in future it should not be left to the individual state to decide for itself when self-defense is justifiable."

[1] Cf. the resolution of the 26th World Peace Congress at Warsaw (1928) relative to the Kellogg Pact: "In future the right to protect the vital interests of the individual states shall not belong to the individual state, but to the juridical organization which stands above the states." *Bulletin officiel du XXVI^e Congrès universel de la Paix*, Geneva, 1928, pp. 130, 163. The 25th World Peace Congress rejected a similar resolution introduced by the present writer and supported by Georges Scelle; the vote was 130 to 120. *Bulletin officiel du XXV^e Congrès universel de la Paix*, Geneva, 1926, p 109. In the commission of the Warsaw Peace Congress the present writer repeated his resolution, and it was unanimously adopted in the plenary session. The 27th World Peace Congress at Athens (1929) in a resolution on the Kellogg Pact and the Covenant of the League of Nations drawn up on the basis of reports by scholars like La Fontaine, Scelle, Spiropoulos and others, stated: "From the Covenant of the League every provision should be removed which permits one or several states, even in case of defense, to resort to arms on the basis of their own decision. Such a decision must be entrusted to an international organ."

§ 4. War of Sanction

There is even more disagreement about war of sanction than about defensive warfare. While in international practise the legitimacy of defensive war is not disputed, despite the attitude taken by the Council of the League of Nations in the Graeco-Bulgarian dispute (1925) and in the difference between Bolivia and Paraguay (1928), yet there are governments which absolutely reject Article 16 of the Covenant. Still there should be no doubt on this point. If, in general, military resistance against the aggressor is permitted, war of sanction appears less dangerous than defensive war. War of sanction consists in one state standing for all and all for one. Definite measures are to be taken in the service of law upon the advice given by a superior tribunal, at least in the form of a report as to whether there is an aggression. But defensive war, provided it is not considered as a war of sanction undertaken by delegation, is waged without consultation of a superior court. The state most interested in the case decides whether there has been an attack. War of sanction is begun by the international community, whereas a defensive war is begun and ended by the attacked state. That state is subject to no control and may abuse its right. For reasons of radical pacifism all war may be eliminated. That is logical. But it is not logical to justify defensive war and to oppose war of sanction. Those who adhere to this view give the individual state the right which they refuse the international community. Often sanctions are opposed because an organized international community is not desired. But there is no doubt that war can be done away with only through an international organization such as the League of Nations.

The forcible application of punitive measures by the League of Nations is not the ideal means of defense against an aggressor state. That goes without saying. As we all know, a war of sanction may bring about a general conflagration and thus lead to the catastrophe which the League of Nations should prevent—in the final analysis the basic mission of the League. The formidable character of modern means of warfare, especially of poison gas, which is a menace even to the civilian population, makes the use of military means against the aggressor more and more problematical. We may ask if under certain circumstances a localization of the war, even though the aggressor state may derive some advantages therefrom, would not be preferable to a general conflagration. This question cannot be exhausted in this place. But it must be remembered that the sanctions of Article 16 should serve as a preventive and that in the interest of peace it would be well for the aggressor to know that he has the entire world against him. Under these conditions war would be prevented in most instances, and neither a local conflict nor a general conflagration would break out.

It may certainly be said that military sanctions should be only an extreme means of helping an attacked state to obtain its rights. When all other expedients have been tried, military sanctions should be resorted to. First

of all, after the opening of hostilities, the League of Nations should bend all its energies to a settlement of the dispute. An attempt at mediation must be made immediately. After the hostilities have begun, the Council should prescribe an armistice. The suggestions contained in the celebrated report of De Brouckère and found also in the German proposals to the committee of arbitration and security endeavor likewise to have these measures applied. Even if Article 11 is not effective, an attempt can be made to persuade the aggressor state to abandon its aggression by non-military measures, especially of an economic and financial nature. With the greatest care the Council should try to solve the special problem in all its different aspects. It must be conscious of the dangers lurking in sanctions and should not apply them hastily.

Particularly for this reason it is dangerous to attach too much importance to the system of sanctions, as the Protocol of Geneva does. The principle adopted must be that it is better to help the attacked state too late rather than, by premature intervention, to provoke a universal war which may perhaps be avoided. It may therefore be asked whether in the final analysis it would not suffice for a really competent League of Nations to perfect the clauses of Article 16. It is not wise to settle all eventualities in advance and to place the Council in such a situation as to sacrifice its freedom of decision and render it unable to adapt its action to the special circumstances of a given case.

The sanctions surely are a temporary phenomenon. The stronger the League becomes, the more progress the idea of the outlawry of war makes in public opinion, and the more Article 11 gains in importance, the more rarely will Article 16 be applied. Some day, wars of execution will be abandoned. Hence we should not follow the example of the Protocol of Geneva and hold the states down to excessively detailed obligations. Otherwise the sanctions will dominate the League of Nations and not *vice versa*. And these sanctions will explode like an infernal machine. In the final analysis the problem of sanctions remains in suspense, and they can be defended only with certain restrictions. It is for this reason that all principles should be avoided which embarrass the Council, and which prevent it in special cases from taking measures for the maintenance of peace, measures which are finally more important than intervention in war undertaken in spite of the League of Nations.

Consequently it is better to avoid laying down special rules whereby to determine the aggressor in special cases, as has frequently been done. Such an attempt has no chance of success, for it is impossible to make rules for the determination of the aggressor which in a special case would not lead to grave injustice. Therefore the Council or some other high instance should be given the right to determine the aggressor in each case, if possible by a qualified majority of the votes. The rapporteur Rutgers, in the Prague memorial published by the committee of arbitration and security declares,[1] "We

[1] *Documents*, Série VI, p. 143.

are constrained to believe that any attempt to lay down rigid or absolute criteria in advance for determining an aggressor would be unlikely in existing circumstances to lead to any practical result." This opinion may be heartily adopted. The British Government, in its memorial to the committee of arbitration and security[1] stressed this point of view even more emphatically. It may be said that in this respect, too, the attitude of the Protocol of Geneva has been abandoned.

Prevailing opinion in the League of Nations has therefore modified its position with regard to determining the aggressor. This proves that we are getting farther and farther away from sanctions and from the idea of their great importance. The report of De Brouckère, which has been mentioned repeatedly, has rendered good services in this respect. Another bit of evidence that public opinion has changed its attitude toward sanctions is the fact that in 1927 the Congress of the International Union of Associations for the League of Nations, meeting in Berlin, passed a resolution concerning the outlawry of war and the pacific solution of all disputes; in this resolution there is no reference whatsoever to military sanctions or to sanctions of any kind.

In order to reach the goal and put an end to all wars of sanctions, it is necessary first of all to interdict all wars between individual states, not only wars of aggression but also wars of defense, unless the latter be wars of sanction undertaken by delegation. In an organized international community only a war of sanction can be authorized. Once we realize completely the interdiction of war between individual states, then we can go further and do away with military sanctions.

This then is the thesis to be maintained. The war of sanctions should be declared possible only as a sole exception to the interdiction of war. At the same time there should be declared possible measures derived from certain obligations imposed by special treaties of alliance, in particular the Pact of Locarno. For these measures are in the final analysis resorted to only for the purpose of guaranteeing the execution of Article 16.

The problem of sanctions presents special difficulties in cases where states not belonging to the League of Nations take part in a pact for the outlawry of war. In view of the basic objection of the United States to military sanctions, it will not be possible in the near future to conclude an agreement with that country whereby it would consent to participate in such sanctions. But for the execution of the sanctions it would signify a step forward if the United States, pursuant to the suggestions of Senator Borah, Nicholas Murray Butler and James Shotwell, should declare itself ready not to support an openly recognized aggressor, and to admit for a case of this kind a restriction of its neutrality rights.

[1] *Documents*, Série VI, p. 175.

§ 5. Punishment of the Aggressor

The problem whether the aggressor should be punished presents a moot question. There is no doubt that military sanctions should never in themselves be a punishment for the aggressor, but only a guarantee for the attacked state. In view of the dreadfulness of war the League of Nations should not seek to punish an aggressor state through military coercion, because in such a case not the real guilty persons but the innocent mass of the population are affected.

But it is quite justifiable to speak of punishing the aggressor state after the conclusion of the war of sanction. We should not overlook that Article 16, paragraph 4, provides that such a state be excluded from the League of Nations; this is looked upon as a dishonor. Hence Article 16 does not exclude the idea of a punishment to be inflicted upon the aggressor. Those who drew up the Covenant in the Paris Peace Conference were evidently guided by such motives.

To be sure, current opinion feels that in international law there can be no distinction, as there can be in private law, between the civil code and the penal code. The idea of punishment to be inflicted upon states is discarded because the state is only a juridical person, a fiction, and recognizes no superior will over its own, in accordance with the principle of sovereignty.

We agree with Hugo Grotius that a penal law is perfectly possible for the states. If the state has a will, if, as has been repeatedly declared in conferences, it may commit a crime by attacking another state, it can be punished for this crime. It may be objected that such punishment would affect innocent people, but this objection is not convincing. For the conclusion would be that it is impossible to impose any reparation or punishment upon states which have committed an offense, on the ground that these measures affect the mass of citizens. Whoever agrees with current opinion that a state is liable to pay reparations cannot oppose the infliction of a punishment upon a state.

But of course the peculiarity of international law and the fact that the states are not physical persons must be taken into account. Under the pretext of punishment there should never be recourse to measures which may destroy the existence of innocent citizens. However, there is no reason why the aggressor state should not be punished in some other manner. It may for instance be temporarily excluded from the sessions of the League of Nations and deprived of its right to vote. Article 16, paragraph 4, of the Covenant, which provides for its exclusion from the League of Nations, is already a two-edged sword which ought to be used only in an emergency.

We might go further and demand an accounting from those physical persons who are responsible for the war. But the condemnation should then be pronounced by an impartial court of justice in accordance with the principle "*nulla poena sine lege*," that is, no punishment except by virtue of law.

The committee of jurists at The Hague in 1920, and the International Law Association in 1922 and 1926, advocated a High Court of International Justice, which some day will probably become a reality.[1] But until this has been achieved, the states should be asked to introduce in their national penal code rules concerning the punishment of those responsible for war, and the form of the procedure to be followed in such cases.[2] Only when national justice is insufficient should the High Court of International Justice be appealed to.

III. THE FORMS OF THE INTERDICTION: TREATY AND CHANGE OF CONSTITUTION

If the states are to be asked to outlaw war, they should not only be asked to do so by an international convention and in a manner which is constantly to be perfected. If the states are sincere in their desire to eliminate war, as we do not doubt, then they should consider the question whether they are ready to introduce in their constitutions a renunciation of war. That would be worth more than beautiful sentiments, and the movement for the outlawry of war would make considerable progress if the statesmen in all the states were to make the solemn declaration: "We deem the idea of the outlawry of war to be sacred. We wish therefore without hesitation and without reservation to renounce war once and for all, and to introduce this principle in our constitutions."

§ 1. The "Jus Belli ac Pacis" in the National Constitutions

Almost all the constitutions of the world are in need of improvement so far as the question of the outlawry of war is concerned. The *jus belli ac pacis* has up to now passed as an inalienable right of the sovereign state, so that even in the most modern constitutions there is no material restriction of the public power with regard to the right of declaring war. But there are a certain number of exceptions which should be carefully enumerated.

Thus on the motion of Mirabeau, Article 4 of the decree of the French National Convention of May 22, 1790, which was later introduced in the constitution of September 3, 1791, stated: "The National Assembly declares that the French nation renounces the undertaking of any war with a view to making conquests, and that it will never employ its forces against the liberty

[1] Cf. Pella, *La criminalité collective des Etats et le droit pénal de l'avenir* (2d ed., Bucharest, 1926); Politis, *Les nouvelles tendances du Droit international*, p. 113; Saldana, "*La justice pénale internationale*," *Recueil des Cours* (Académie de Droit international), X, 227; Vadasz, "*Juridiction criminelle internationale*," *Revue Sottile*, 1927, p. 274; International Law Association, Report of the thirty-first Conference, I, 63; Report of the thirty-third Conference, p. 74; Report of the thirty-fourth Conference, p. 277; the articles of Volume III (1926) in the *Revue internationale de Droit pénal;* the questionnaire of the *Friedenswarte* (April, 1927), and the replies of numerous jurists.

[2] Cf. Pella, "*La propagande pour la guerre d'agression*," *Revue de Droit international* (Lapradelle-Politis), 1929, p. 174; idem, *Les Modifications d'ordre international qu'importe le Pacte de Paris. Rapport présenté au XXVII^e Congrès universel de la Paix*, 1929.

of any people."[1] The debates of the National Assembly at that time had borne on the question who should have the decision in matters of peace and war. But the men of the French Revolution did not content themselves with solving this problem. The debates on the question who should declare war in the name of France led to an elaborate discussion of a much broader problem, namely, the legitimacy of war in general. The debates of that time were on a very high plane. It is useless to review them in detail. We may say, however, in this connection, that the members of the French National Convention of 1790 were far from giving full freedom to the executive power so far as defensive war is concerned. Even in case of defensive war the government, according to the decree of May 22, 1790, had to make an immediate report to the legislative body (Art. 3). If, according to the report in question, the legislative body decided that war should not be waged, the executive power had to take immediate measures to check hostilities and to prevent others (Art. 5). If it appeared that the hostilities already begun were equivalent to a culpable aggression, then the author of the aggression had to be regarded as "*coupable de lèse nation*" (Art. 4). Likewise the guilty party was held responsible if hostilities were not immediately checked after the parliament had given orders. In other words, the French people deemed the most substantial guarantees necessary against all defensive wars which were frivolously undertaken.

In the course of its development the French Revolution abandoned its great program for the outlawry of war. The provisions of the decree of May 22, 1790, lost their obligatory character during the Napoleonic era. Later the step taken in 1790 was continued by the South American states.[2]

The constitutions of Venezuela (Art. 13, No. 8, and Art. 112 of March 28, 1864; Art. 142 of June 13, 1893; Art. 120 of April 27, 1904, and Art. 138 of August 4, 1909), and of Ecuador (Art. 116 of March 14, 1878), of the Central American Republic founded temporarily in 1895 between Nicaragua, Honduras and Salvador (Art. 4 of the treaty of the Union of Amapa, June 30, 1895) have recognized the principle of arbitration. They state that the clause of unlimited arbitral jurisdiction (excluding all war) will be introduced in the international treaties of the states in question. The constitution of San Domingo goes still further (Art. 20 of May 20, 1880; Art. 101 of June 12, 1896; Art. 102 of March 20, 1908). It states that no war should be declared without a previous attempt to settle the dispute pacifically. It provides also that a clause be introduced in all international treaties by virtue of which an arbitral tribunal is to be instituted before hostilities begin.

[1] Cf. Buss, *Geschichte und System der Staatswissenschaft* (Freiburg, 1839), pt. I, p. ccclxix; Redslob, "*Volkerrechtliche Ideen der franzosischen Revolution*," in *Festgabe fur Otto Mayer* (Tübingen, 1916), pp. 279 ff.; Mirkine-Guetzevitch, "*La Révolution française et l'idée de renonciation à la guerre*," *La Révolution française*, LXXXII, no. 3 (1929), pp. 255 ff.

[2] Cf. *Segunda-Conferencia Internacional Americana*, Mexico, 1901, p. 316; Moch, *Histoire sommaire de l'arbitrage permanent* (Monaco, 1910), p. 61; Sa Viana, *L'Amérique en face de la conflagration européenne* (Rio de Janeiro, 1916), p. 20; Boissier, *Le Contrôle parlementaire de la politique étrangère en Europe et au Canada en 1924* (Geneva, 1926), p. 69.

The most important constitutional articles of South America are those of Brazil of February 24, 1891. According to Article 31, No. II, the Federal Congress can authorize the government to declare war only if the appeal to arbitration has been impossible or has failed. Article 88 contains also the principle that Brazil can in no case participate in a war of conquest, either directly or indirectly, either by itself or by reason of an alliance with another nation. Later Uruguay, in Article 79 of the constitution of October 15, 1917, adopted Article 31, No. II, of the Brazilian constitution.

Among the European states Portugal was the first to follow this example. Article 26, No. 14, of the constitution of August 21, 1911, gives the congress the right to declare war only where there is no question of an appeal to arbitration or where the appeal has failed, unless there is danger of an attack or in case an attack has already been begun by enemy forces. Moreover, Article 76 declares that the principle of arbitration is the best method for the settlement of international disputes, with reservation of the obligations contained in the treaties of alliance.

Finally we note Article 57 of the fundamental constitutional law of the Netherlands, in its form as modified by the law of November 10, 1922. According to this article, the king should try to "settle the disputes with foreign powers in the judicial way and by other pacific means."

So far as we know there are no other constitutional stipulations which contain positive juridical limits to the right to declare war. A far-reaching motion made in 1916 in the Swedish parliament called for the abolition of the right to declare war as stated in paragraph 13 of the constitution. It was approved only in the first chamber and rejected in the second.[1]

If it must be admitted that all these constitutional provisions are not perfect, they represent nevertheless a considerable advance over the laws of the majority of states. Not without reason did a number of states, in the deliberations of the Assembly of the League of Nations, make repeated references to the above constitutional provisions, in order to prove that their policy was favorable to the League of Nations.[2]

Finally we may say that from the formal point of view the two following constitutions contain interesting guarantees for the maintenance of peace. In the first place, Article 43 of the Latvian constitution of February 15, 1922, provides that the president of the Republic, in taking measures necessary for the defense of the country, must at the same time call together the parliament, which shall decide upon peace or war. Moreover, Article 33 of the constitution of Czechoslovakia of February 29, 1920, provides that for the declaration of war a three-fifths majority of all members in both chambers is necessary.

[1] *Organisation centrale pour une paix durable* (The Hague, 1928) IV, 349.

[2] Cf. *Actes de la V^e Assemblée. Séances plenières* (Geneva, 1924), p. 75 (address of the representative of Brazil, Mello-Franco), and p. 190 (address of the representative of San Domingo, De Castro).

§ 2. The Appeal of the Interparliamentary Union

The constitutions of the various states are therefore very important for the outlawry of war, and the task which they must accomplish in this respect should be all the more evident in view of the experiences gained during the Great War. This was realized in good time. The Central Organization for a Durable Peace published a *Recueil de rapports sur les différents points du programme-minimum*.[1] Here the Swede Carl Lindhagen demanded in 1918 that after the Great War the idea of "war" should be eliminated from the constitutions as a malicious idea and one which should be given no consideration. Not long after, Professor C. van Vollenhoven (Leyden) published a celebrated work, translated simultaneously into three languages and entitled *The Three Phases of International Law*.[2] He declares that the following is a decisive question for the future of international law: "Are you ready, sovereign state, to join with the other states in eliminating completely from your constitution the right to declare war, and to say that your military forces will be used only to protect the violated law, on the basis of universal treaties?" Van Vollenhoven continues: "Whoever replies heartily in the affirmative, wants the League of Nations and a durable peace. But whoever replies that he would like to, but that his wars of aggression are always purely defensive and that his sovereign right could not exist except through the force of his sovereign sword, he draws the mask from his own face, covers himself with shame and desires not eternal peace but the eternal anarchy of Vattel."

No doubt under the influence of the book of Van Vollenhoven the official commission of Dutch experts in their *Principles of the League of Nations* published in January, 1919, declared: "The right to make war is irreconcilable with the League of Nations."[3]

In the same year Wilhelm Kaufmann, professor at the University of Berlin, in an article on the community of the peoples and the constitution of the German democracy,[4] proposed the introduction of the following article in the new German constitution:

> The German democracy expressly recognizes that under present circumstances it would be a terrible crime against the community of the nations for a people belonging to this community to undertake or provoke a war of aggression.

The movement in favor of the constitutional outlawry of war was given a strong impetus by the American movement. The outlawry of war through the constitutions of the various states forms a special chapter in *The Outlawry of War* by Morrison.[5] To be sure, Morrison would make the constitutional amendment contingent upon the good will shown by the other

[1] The Hague, 1918, IV, 338.
[2] The Hague, 1919, pp. 92 ff.
[3] Grotius, *Annuaire international pour 1918*, The Hague, p. 115.
[4] In the supplement to *Republik* of January 1, 1919. Recently reprinted in *Friedenswarte*, 1928, pp. 234 ff.
[5] Chicago, 1927; especially p. 43.

nations in following this example. On the other hand a resolution presented to the Senate on April 23, 1926, by Senator Frazier and later elaborated by the Women's Peace Union, called for the outlawry of war in the United States Constitution.[1] Finally the suggestion of the American ambassador Houghton to make the decision as regards war and peace depend upon a popular plebiscite attracted considerable attention.

All these efforts were crowned by the resolution of the Twenty-second Interparliamentary Conference at Berne on August 25, 1924. At that time the Union, after hearing a report of Professor Walther Schücking, adopted the following resolution without any opposition:

It recommends to the national groups to submit to their parliaments drafts for a constitutional amendment looking toward:

a. The interdiction of any recourse to war, with reservation of the obligations assumed according to Article 16 of the Covenant of the League of Nations;

b. The obligation of resorting to arbitration or to other amicable or judicial means for the solution of differences with other states, in every case where an amicable arrangement has not been attained by direct negotiations.[2]

In his report to the Conference Professor Schücking stated:[3]

In its second part the resolution of the juridical commission turns to aggressive wars and demands that the constitution of each state be supplemented by provisions rendering such wars impossible in future, by virtue of the fact that in the guaranty pact submitted to the approval of all the governments in accordance with the resolution of the Fourth Assembly of the League of Nations, aggressive war is stigmatized as an international crime. The catastrophe of the Great War has given us a better understanding of this problem. According to the theory of the law of nations which prevailed before the Great War, war was considered as a legitimate means for the realization of right, but in practise the difference between right and interest was not always observed; indeed, it was sometimes even abandoned in theory. The jurisprudence of the last century dropped the study of the difference between a just war and an unjust war because of the lack of a superior instance to decide this question. In view of this state of affairs the Covenant of the League of Nations achieved great progress because there was established for the future, on precise juridical principles, the difference

[1] Cf. Hearing before a subcommittee of the committee on the judiciary, United States Senate. Sixty-ninth Congress. Second session on S. J. Res. 100. A joint resolution proposing an amendment to the Constitution of the United States relative to war. January 22, 1927. The resolution of Senator Frazier of December 9, 1927, reads as follows: "Joint Resolution proposing an amendment to the Constitution of the United States prohibiting war. Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein): That the following article is proposed as an amendment to the Constitution, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three-fourths of the several States: Article 1, Section 1. War for any purpose shall be illegal, and neither the United States nor any State, Territory, association, or person subject to its jurisdiction shall prepare for, declare, engage in, or carry on war or other armed conflict, expedition or invasion, or undertaking within or without the United States, nor shall any funds be raised, appropriated, or expended for such purpose. Section 2. All provisions of the Constitution and of the articles in addition thereto and amendments thereof which are in conflict with or inconsistent with this article are hereby rendered null and void and of no effect. Section 3. The Congress shall have power to enact appropriate legislation to give effect to this article." In England a similar demand was recently made by G. Spiller in a pamphlet entitled "The Abolition of Aggressive War by Comprehensive Legislation," (London, 1928).

[2] *Union interparlementaire, Compte rendu de la XXII^e Conférence tenue à Berne et Genève* (Lausanne, 1925) pp. 458, 657.

[3] *Idem*, pp. 190 ff.

between a legitimate and an illegitimate war. But just as in the Middle Ages an absolute interdiction of the feud through the Truce of God followed the restriction of the feudal prerogative, which interdiction, in the Eternal Peace of 1495, branded force as a crime, just so there are forces at work to-day which reject all legitimate war and appraise the appeal to force by the individual state as a crime. It is in keeping with the historical traditions of our Union to march in the van of this movement. It is from this point of view that we recommend the amendment of the national constitutions by a provision proscribing in principle all war, of course with the reservation of the obligations resulting from Article 16 of the Covenant of the League of Nations, whereby the members agree to lend each other mutual support against a state which has broken the Covenant. Such a constitutional provision would go much farther than the restrictions which at present the public law of certain states impose upon the right to declare war, by submitting the question, for instance, to the consent of the parliament. Even when the constitution of a state already prescribes the form of law for every declaration of war, as is the case in Germany, an absolute constitutional interdiction of every declaration of war would still have a great juridical importance, since it would then be necessary to follow the special procedure required in most of the states for a change in the constitution. This is already the case in the constitution of Czechoslovakia (Art. 33).

In the deliberations of the juridical commission of the Interparliamentary Union of April 3 and 4, 1924, which prepared for the deliberations of the plenary assembly, there was no opposition, either, to the idea of the outlawry of war in the constitutions of the various states. There was discussion only on a suggestion presented by La Fontaine (Belgium). The latter proposed that instead of the phrase "with reservation of the obligations assumed according to Article 16 of the Covenant of the League of Nations" there should be substituted "with reservation of the general or regional obligations contracted by the states for their mutual defense in case of armed aggression." But this proposal was defeated and the original wording was adopted.[1]

The Governments would certainly take a laudable step if they adopted the suggestions of the Interparliamentary Conference of 1924.

§ 3. The Outlawry of War in the National Constitutions

No doubt it is difficult to formulate the outlawry of war in such a way that it can be adopted in all the constitutions of the world. The same difficulties arise which led to differences of opinion between Mr. Kellogg, the American Secretary of State, and M. Briand, the French minister. The German Cartel for Peace which comprises all the German peace organizations, has recently taken up this problem with the cooperation of the present writer, and on April 30, 1928, it decided to submit to the Reichstag and to the Government of the Reich a petition wherein it asks that Article 35, paragraph 2, of the Weimar Constitution, whereby the declaration of war and the conclusion of peace are effected by virtue of a law of the Reich, be replaced by the following provisions:[2]

[1] *Procès-verbal du Comité de Rédaction de la Commission des Questions juridiques. Séance du 3 avril 1924.* (Not printed.)

[2] This petition was presented to the Reichstag on November 17, 1928. Cf. *Friedenswarte,*

1. The German Reich renounces in future the recourse to war. International disputes should in future be settled exclusively by pacific means, or by mediation, or by an arbitral tribunal, or by an appeal to the Permanent Court of International Justice.

2. The rights and obligations provided by Article 16 of the Covenant of the League of Nations remain the same. Military measures in accordance with Article 16 of the Covenant can, however, be taken only by law of the Reich, and they must have been decided upon by the majority requisite for constitutional modifications.

3. Military acts decreed contrary to these provisions shall automatically be declared criminal. A special law shall determine the punishment incurred in such a case by the responsible authors, as well as the form of the procedure to be taken against them.[1]

This proposal, which could be adapted also to the constitutions of the other countries, insofar as they belong to the League of Nations,[2] is based

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1928, pp. 360 ff. See also Kurt Hiller, "*Staatsrechtliche Folgen des Kellogg-Pakts*," *Berliner Tageblatt*, December 4, 1928. This petition of the cartel was described by the government as "impracticable" because the necessary qualified majority for such an amendment to the Constitution does not exist in the Reichstag. Cf. *Friedenswarte*, 1929, p. 277.

[1] *Friedenswarte*, 1928, p. 178.

[2] The general assembly of the French peace society La Paix par le Droit adopted the following two resolutions at Nancy on October 30, 1928:

I. The general assembly of La Paix par le Droit,

Considering that the Covenant of the League of Nations has taken away from the governments of the states belonging to the League every competence for the conclusion of secret treaties:

Considering also that the Kellogg Pact takes away from the public powers every competence to undertake an offensive war for a purpose of national policy;

Deems that it is necessary to revise the text of Articles 8 and 9 of the constitutional law of July 16, 1875, in the following way.

Article 8. No ratification of a treaty shall be given except with the consent of the Chambers, and every treaty must be registered verbatim with the Secretariat of the League of Nations.

Article 9. No declaration of war shall be made and no mobilization shall be decreed except with the consent of the Chambers, a consent which shall be obtained only after the Chambers have determined that the country is in a situation of legitimate defense or that it is obliged to give international assistance by virtue of the Covenant of the League of Nations, by virtue of the pact for the renunciation of war, or by virtue of any treaty of assistance or of guarantee concluded in the sense of these two pacts.

II. Considering that the citizen has the right to demand respect for his life and his liberty within the limits of the constitutional and legal guarantees,

The Assembly deems that it is urgent to study the organization of an internal and international jurisdictional control of the acts of the public powers, with a view to assuring the respect of the constitutional principles above enunciated. This jurisdictional control should be able to be exercised by the citizens themselves individually and collectively.

In the course of the session of the general council of the Union of Associations for the League of Nations, which met at Prague early in October, 1928, the French Association for the League of Nations moved that the following resolution be placed upon the agenda of the assembly:

Considering,

a) That the creation of the League of Nations, with the profound transformation which it presupposes in the relations of the states, took place later than the promulgation of most of the existing constitutions;

b) That the Briand-Kellogg Pact has solemnly proclaimed the condemnation of war as an instrument of national policy;

That from this interdiction there follows for the citizens a veritable right to peace, and that this right should he inscribed in the contract which binds the citizens to the government, that is to say in the national constitution;

That the citizen should likewise have a recourse against the government of his country when it commits the crime of resorting to war without having exhausted all political and juridical possibilities of resolving an eventual conflict by pacific means;

And, reciprocally, that the government which tries loyally to apply the Kellogg Pact in its letter and spirit should be protected by the constitution against those citizens who

upon existing law. Its purpose is not to solve the problem definitely. This will be possible only if more progress is achieved in the international field in the future than there has been in the past. But since it seems desirable to outlaw war in the constitutions of the various states as soon as possible and without awaiting the elaboration of an ideal international pact, existing law must be used as a basis. In reference to Article 16, defensive wars are permissible. The obligations resulting from alliances which were established only to supplement Article 16 will be maintained in their entirety.

The provision, whereby wars of aggression are constitutionally prohibited and wars of defense and of sanction can be decided upon only by a qualified majority of the legislative organs, would be of immense importance. For up to now the constitutions have not generally provided for the approval of the national representation as necessary in case a defensive war must be undertaken. On the contrary, it is possible to install the military powers regularly without consulting the legislative organs. If in future even defensive war cannot begin without the approval of the national representation, and if this approval itself depends upon the qualified majority, no defensive war could then be frivolously undertaken. The obstacle would be still greater if it were possible some day to introduce in a pact for the outlawry of war a provision whereby a defensive war could not be declared before an international

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by appeals to hatred, by instigation, by the diffusion of false information or otherwise try to compromise the sincerely pacific action of the said government;

The International Union of Associations for the League of Nations earnestly invites the national associations to act with a view to bringing the legislation of their country in harmony with the Briand-Kellogg Pact and in a general way with the provisions of the League of Nations.

The Italian delegate Professor Gallavresi was not favorable to the French proposal. In the course of the discussion the French delegation withdrew its motion, reserving the right to present it again later. (*Bulletin de l'Union internationale des Associations pour la Société des Nations*, 1928, no. 5, p. 34.)

Later, on February 23, 1929, the political and juridical commission, in its session at Brussels, adopted the following text:

The Assembly earnestly invites the national associations to study the constitutions and the legislation of their respective states and to work out if necessary those modifications which will harmonize their national legislation with the Covenant of the League of Nations and with the Kellogg Pact. (*Bulletin de l'Union internationale des Associations pour la Société des Nations*, 1929, no. 2, p. 49.)

The thirteenth plenary session of the International Union of Associations for the League of Nations at Madrid (May 20 to May 24, 1929) limited itself, in a general resolution on the "organization of peace," to expressing the wish "that the members of the League of Nations may strive to draw all political and legal consequences from the treaty for the renunciation of war." (*Union internationale des Associations pour la Société des Nations, XIII Assemblée Plénière, 1929* (Brussels, 1929), p. 115.)

Finally the XXVII World Peace Congress at Athens (October 6 to 10, 1929) adopted the following resolution on the Kellogg Pact and national constitutions:

Considering,

a) That the creation of a League of Nations, with its far-reaching modifications in the relations of the states, is not in harmony with most of the existing constitutions;

b) That the Kellogg Pact solemnly demands the condemnation of war as an instrument of national policy, the Twenty-seventh World Peace Congress asks the governments and peoples of the world which have signed the Kellogg Pact to bring their constitutions in harmony with it and to adopt in the said constitutions a paragraph with the obligation that they must solve all international disputes in a pacific manner . . .

instance has decided as to its legitimacy. The more any event is likely to injure humanity, the more necessary it becomes to restrict it by substantial protective measures. It is natural that, against the dangers of a modern war which to-day menace the peoples more than ever, there should be guarantees of a novel amplitude, national as well as international. These precautionary measures should be taken before the armed conflict has broken out and before the actual power has passed into the hands of the generals.

We should recall that at the time of the discussions of the German Cartel for Peace, Hellmut von Gerlach was the only one to raise objections to paragraph 2. According to this paragraph, measures adapted to Article 16 of the Covenant should not be undertaken except by law of the Reich and by a majority required for constitutional amendments. Von Gerlach stated that this made it more difficult still to execute Article 16 and was even equivalent to sabotage against it. He proposed the elimination of paragraph 2. But it must be said that, on the one hand, the national representation is bound by the obligations of Article 16 of the Covenant, and that on the other hand, in view of the far-reaching nature of military sanctions, the decision must be rendered more difficult. By eliminating paragraph 2, defensive war would not be made dependent upon a law of the Reich to be passed only by the majority provided for constitutional amendments.

§ 4. Conditional or Unconditional Modification of Constitution?

It may now be asked whether the states should renounce absolutely the right to declare war, or whether this renunciation should depend upon other powers and upon corresponding modifications which they may introduce in their constitutions. Since war is a crime, the commission of this crime must be renounced absolutely. If it is a question of limiting armaments, a state may say with some reason that it can bind itself to such a program only if its neighbor does the same. But in contrast to this latter problem, the renunciation of the right of war implies no danger. The example set by each separate state would have such a moral influence upon the other powers, by obliging them to outlaw war, that in the final analysis the danger of a foreign attack would be diminished and the security of each state would be greater.

When recently the German Reich prohibited the importation of arms to China, Stresemann, minister of foreign affairs, declared in the Reichstag on March 29, 1928: "We know very well that it is impossible to prevent completely the traffic in arms with China, if the states do not take all measures against the manufacture of arms or against the traffic in arms with China, so far as such measures have not already been taken. It would be well to find an international solution to this problem. We, for our part, are ready to cooperate. But we do not care to wait until the cumbersome apparatus of international agreement gets into motion. We desire to prevent the traffic in arms . . . by a German law."

In the same way it is a question for every state to decide whether it is going to wait, before outlawing war, until "the cumbersome apparatus of international agreement" gets into motion, or whether it means to renounce war definitely by a law modifying its constitution.

IV. DRAFT OF AN INTERNATIONAL TREATY FOR THE OUTLAWRY OF WAR

We shall try now to draw up an international treaty on the outlawry of war. At the head of these proposals we must inscribe three principles: First, necessity of clearly determined legal obligations; secondly, creation of an international control; thirdly, necessity of provisions for security in case the treaty has been violated.

As regards the necessity of clearness, we have already stated that no exception to the principle of the outlawry of war should be passed over in silence. The nations should know exactly what their obligations are. Only in this case can the treaty have that broad basis without which it would be too much exposed to the danger of violation. The problems concerning the pacific occupation of foreign territory, war of defense and that of sanction, the fulfilment of the obligations resulting from the Pact of Locarno and other treaties should be expressly laid down in this treaty. It seems to us possible to introduce in this pact all these reservations without weakening its moral effect. Indeed, let us not forget that for the members of the League of Nations all reservations can be traced in the final analysis to Article 16 of the Covenant, to the condition of considering defensive war as a war of sanction waged by delegation, and to the obligations resulting from the Pact of Locarno and from other treaties as supplementary to the obligations provided by Article 16 of the Covenant of the League of Nations.

But a treaty for the outlawry of war admitting defensive war (and war of sanction) as it has been admitted up to now, would contain an enormous gap. If every government can, under certain conditions, take up arms when it believes subjectively that it may do so, when it affirms from its point of view that there is necessity for defensive war (or for war of sanction), the very purpose of the treaty is in danger of being overlooked.

On the other hand we should not disregard the fact that the interdiction of defensive war can be carried out in practise only if the states are guaranteed the security of their vital interests by other means. Hence it is necessary to try by all means to strengthen the League of Nations, so that the exclusive protection of the vital interests of the states will be entrusted to it. The only question is how this idea can be realized in a pact for the outlawry of war so long as the United States steadfastly refuses to enter into legal relations with the League of Nations.

First of all one could try to define "defensive war." But after studying all the attempts at such a definition we must say that it is fruitless to try to

fix objectively the concrete conditions for a defensive war and the motives justifying it, namely, a case of aggressive war.

And yet, if the treaty in question is not to be the cause of grave disappointment, care must be taken that for the establishment of the legitimacy of defensive war, the subjective decision of the state taking arms is eliminated. There would be considerable progress made in this sense if in the treaty for the outlawry of war concluded with the United States there were an international tribunal whose duty it would be to establish the fact of the legitimacy of defensive war. If this were the case, every one would know who is the aggressor and who the defender. There would then be no ground to fear the frivolous declaration of a defensive war for reasons of aggression.

We are ready, therefore, to admit, at least not to prohibit, defensive war and war of sanction, on condition that its legitimacy be established by a superior tribunal. But in order to reduce to a minimum the dangers resulting from a defensive war and from a war of sanction, the international tribunal must forthwith be given the right to decree an armistice after the opening of hostilities. The proposal of the German delegation to the committee of arbitration and security at Geneva has a universal historical significance and may serve as a model here. So far as human mind can see, defensive war will be rendered useless in this way, and at the same time the determination of the aggressor will be facilitated.

As regards the organization of the international board of control, the idea of creating a new judicial tribunal naturally introduces new complications in the treaty. But by reason of the reserved attitude which the United States takes toward the League of Nations, there is nothing left to do but create a new court for the outlawry of war. If the attempt were made to entrust this mission to the League of Nations, the United States would be opposed from the very start. As regards the Permanent Court of International Justice, it is not certain either whether the United States would consent to concede to it the character of a court for the outlawry of war. We may add that it would not be wise to burden the Permanent Court of International Justice with a new task which would carry enormous political responsibility. But the difficulties of technical organization of the new court could be diminished if there were an agreement on the necessity of utilizing in great part as judges of the new court those persons who have served with success on the Permanent Court of International Justice. That would decrease considerably the expense of starting the new institution. For the rest, the governments should remember that it would be better to spend a million per year to assure peace than many millions for an armed cruiser.

Another solution of our problem could be proposed. The Council of the League of Nations could be entrusted solely with the determination of the aggressor, and it could be left to the United States to decide whether it was willing or not to admit the decision of the Council. But this solution is not acceptable, for in such a case there would be no body capable of acting

in the hypothetical case of a war undertaken by the United States itself. No doubt we may be convinced that the United States will respect the treaty. But it would not do to take it for granted that a contracting state will never violate the treaty.

We must state briefly what would be the relation between the new instance of control and the Covenant of the League of Nations or the Pact of Locarno. If the new pact were made, it would not be necessary to modify the Covenant of the League of Nations in a formal way. For the provisions here suggested imply only an extension of the rights and privileges provided by Article 16, an extension perfectly permissible outside of the Covenant. But the Pact of Locarno would have to be modified if the court for the outlawry of war had to determine the aggressor in case of violation of the conditions fixed by the Pact of Locarno. Hence it is necessary to make special provision for this case in the treaty.

In the previous discussion of the pact for the outlawry of war it was pointed out several times how frail is the basis upon which a treaty rests which contains only the interdiction of war and does not give the states any security in case of aggression. Indeed, what are we to think of a treaty which, at the very moment when one of the parties breaks the pact, considers the rights and duties of the contracting parties suspended? It seems to us that precisely in this case the principles of the treaty should have all their force and that the obligations of the contracting parties should be as effective as possible, in determining the aggressor and in outlawing him from the moral point of view or in other ways. The question of the outlawry of war is too closely bound up with that of security to make it possible to expect decisive results from a treaty which overlooks the contingency of a violation of the law.

This idea has been incorporated in the writer's draft in the form of an international board of control. But we may go still farther. In the treaty for the outlawry of war it is necessary to foresee the possibility of a grave violation of the law, and of sanctions put in operation in conformity with Article 16. The system of sanctions of the Covenant of the League of Nations contains, so to speak, a minimum of requirements as regards assistance to be given an attacked state. It must therefore remain in full force. If an international body can first decree an armistice and determine the aggressor, the dangers of an abuse of Article 16 will be lessened as much as possible.

In view of the attitude which the United States has adopted up to now, it may be feared that even in case of a duly determined violation of the law, when the members of the League of Nations fulfill their obligations as provided by Article 16, the United States would remain neutral and would perhaps even make it difficult for the members of the League to resort to sanctions. Is this not a great danger? Would not a possibility of this kind make it possible for the state violating the law to risk the undertaking con-

trary to law? For that reason it would be very important for the United States to reserve in principle the right to support in some form the action of the League of Nations, as eminent persons like Borah,[1] Butler [2] and Shotwell [3] have suggested, and not to remain neutral with regard to an aggressor state.[4] In this general form, which leaves full freedom to the United States to participate in the sanctions of the League of Nations, the draft would surely be acceptable even to the American Government. There would have to be an attempt made to reach similar agreements with Russia and with other states not belonging to the League of Nations.

The United States in particular should not reject these ideas if it wishes that the pact for the outlawry of war be more than a simple affirmation. The American Government should take into account the peculiar situation in which Europe finds itself. The problem of the outlawry of war is a world problem and cannot be solved from the American point of view alone. Now the time has come when the United States can show that it is ready to pursue not only an American policy but a truly international policy.

[1] In an interview on March 25, 1928, published in the New York Times.

[2] In an address delivered on January 10, 1927.

[3] "*Les Enseignements de l'histoire et le Problème de la Paix*," *L'Esprit international*, 1 October, 1927, p. 516; Shotwell, "Defining war without a definition," New York Herald Tribune, March 28, 1928; Shotwell, "*Renonciation à la guerre et non mise hors la loi de la guerre*," *L'Esprit international*, 1 October, 1928, pp. 483 ff.

[4] Cf. the important publication of the Foreign Policy Association on American Neutrality and League Wars of March 30, 1928; Whitton, 17 *Recueil des Cours* (*Académie de Droit international*), (Paris, 1928), pp. 546 ff.; Wright, "The Future of Neutrality," International Conciliation (New York, 1928), no. 242, pp. 23 ff.; also Lechartier, "*La guerre comme instrument de politique nationale*," *L'Esprit international*, 1 April, 1929, pp. 258 ff.

A number of resolutions in the United States Senate have tried to modify the conception of neutrality. A resolution introduced by Senator Burton on December 5, 1927, demanded that the United States of America adopt the policy of preventing the exportation of arms, munitions, etc., into a country which has started an aggressive war in violation of a treaty. But in a later form of his resolution of January 25, 1928, Burton returned to the old conception of neutrality and sought only to extend it in the sense that America should prohibit the exportation of arms, munitions, etc., to any belligerent country. A resolution of Senator Capper of December 8, 1927, wished to declare it to be the policy of the United States not to protect those American citizens who give their aid to an attacking state. In a later resolution of February 11, 1929, Capper extended his resolution to include the contents of the first version of the Burton resolution. This important resolution provided with reference to the Kellogg Pact

1. That whenever the President determines and by proclamation declares that any country has violated the multilateral treaty for the renunciation of war, it shall be unlawful, unless otherwise provided by Act of Congress or by proclamation of the President, to export to such country arms, munitions, implements of war, or other articles for use in war, until the President shall by proclamation declare that such violation no longer continues.

2. It is declared the policy of the United States of America that the nationals of the United States shall no longer be protected by their government if they give aid and comfort to a nation which is guilty of a breach of the treaty.

3. The President is hereby requested to enter into negotiations with other governments which ratify or adhere to the said treaty to secure agreement that the nationals of the contracting governments should not be protected by their governments in giving aid and comfort to a nation which has committed a breach of the said treaty.

4. The policy of the United States as expressed in section 2 hereof shall apply only in case of a breach of the said treaty by war against a government which has declared its adherence to a similar policy.

Cf. Woolsey, American Journal of International Law, 1929, p. 379; *L'Esprit international*, 1 April, 1929, pp. 299 ff.

There is no doubt that a treaty based upon such principles will meet with grave political difficulties even now. But we do not mean to create a draft which is to be accepted as soon as possible but which will prove its inapplicability when the first practical case comes up. It is more important to lay down a minimum of rights and duties without which an international treaty for the outlawry of war would give rise to grave objections. The elaboration of such a treaty will prepare the way for future developments.

A treaty drawn up according to the above principles would read as follows:

Article 1. The high contracting parties henceforth renounce the instrument of war.

The interdiction of war extends likewise to all acts having a warlike character, in particular to the military occupation of foreign territory, to invasion or military attack of foreign territory.

The question whether there has been a violation of the provisions contained in paragraphs 1 and 2 of this article should never be decided unilaterally for one contracting party but, under reservation of the provisions of Article 5, it should be settled solely by the Court for the Outlawry of War.

Warlike acts which have been instituted in contradiction to these provisions are hereby declared criminal.

Article 2. International disputes shall be settled exclusively by pacific means, either by diplomatic negotiations, or by mediation, or by an arbitral tribunal, or by appeal to the Permanent Court of International Justice.

Article 3. The contracting parties agree to introduce the provisions of Articles 1 and 2 into their constitutions within a year after the ratification of this treaty. They agree likewise to inflict punishment upon the persons responsible for an attack and to regulate the procedure to be observed in such cases. This is to be done by means of a special law.

Article 4. Within a year after the ratification of this treaty there shall be established at The Hague a Court for the Outlawry of War. This court is to consist of eleven members, who must be from different states. The judges who are citizens of the states engaged in hostilities shall have only advisory votes.

Article 5. If hostilities break out in contradiction to Article 1 of this treaty, each of the contracting parties agrees to bring the matter immediately before the Court for the Outlawry of War. The president of this court shall forthwith give the states engaged in the dispute the order to suspend hostilities immediately.

If this order is not immediately executed, the court shall, forty-eight hours after having given its order, decide by a majority of three-fourths which state is to be regarded as the aggressor and which is the attacked state. As soon as this decision has been made known, the state declared to have been attacked shall have the right to resort to military measures. If twenty-four hours after the determination of the aggressor the hostilities still continue, the contracting parties are free to make a decision with regard to the state which the court has declared to be the aggressor. For the states which belong to the League of Nations the obligations prescribed by Article 16 of the Covenant concerning mutual aid come into force. The United States of America reserves the right to decide in

each case whether it will support the measures of sanction taken against the aggressor who has violated the law.

If the court has not reached a decision in the question of determining the aggressor, the contracting powers agree to take such joint measures as they may deem necessary for the realization of peace.

Article 6. The rights and obligations transmitted in Article 5 to the Court for the Outlawry of War shall be exercised by the Council of the League of Nations by virtue of Article 4 of the Pact of Locarno and under the conditions of Article 2 of the same Pact.

Article 7. Disputes to which the interpretation of this treaty may lead shall be submitted to the Permanent Court of Arbitration at The Hague in conformity with the Convention for the Pacific Settlement of International Disputes of October 18, 1907.

Certainly even the simple declaration of the principle of the outlawry of war, without control or security, may be considered a long step forward in comparison with existing law. This point need not be stressed. The truth which Victor Hugo affirmed fifty years ago in a celebrated address upon the occasion of the centenary of Voltaire's death is beginning to be recognized everywhere. War is dishonored. Upon the complaint of mankind, civilization has brought suit against the conquerors and the generals. A new era has begun. For thousands of years war has been regarded as a natural event, as a matter of course. Now humanity is beginning to grow conscious of its dignity and to realize that the cooperation of the peoples is a greater reality than the settlement of disputes by that "frightful international exposition which is called a field of battle."

Though we have reached but the first stage of the triumph of this great idea, yet we have every reason to hope that the efforts to surmount the many difficulties will be crowned with success, and that in a not too distant future we will complete the great task of outlawing war.

APPENDIX

1. ARTICLES 10–17 OF THE COVENANT OF THE LEAGUE OF NATIONS[1]

ARTICLE 10. The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

ARTICLE 11. Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council.

It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

ARTICLE 12. The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the report by the Council.

In any case under this Article the award of the arbitrators shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.

ARTICLE 13. The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration.

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration.

For the consideration of any such dispute the court of arbitration to which the case is referred shall be the court agreed on by the parties to the dispute or stipulated in any convention existing between them.

The Members of the League agree that they will carry out in full good faith any award that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto.

ARTICLE 14. The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

ARTICLE 15. If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to

[1] League of Nations Official Journal, 1920, pp. 5–8.

the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary General, who will make all necessary arrangements for a full investigation and consideration thereof.

For this purpose the parties to the dispute will communicate to the Secretary General, as promptly as possible, statements of their case, with all the relevant facts and papers, and the Council may forthwith direct the publication thereof.

The Council shall endeavour to effect a settlement of the dispute, and if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

Any Member of the League represented on the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

If a report by the Council is unanimously agreed to by the members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

The Council may in any case under this Article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute, provided that such request be made within fourteen days after the submission of the dispute to the Council.

In any case referred to the Assembly, all the provisions of this Article and of Article 12 relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that a report made by the Assembly, if concurred in by the Representatives of those Members of the League represented on the Council and of a majority of the other Members of the League, exclusive in each case of the Representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the members thereof other than the Representatives of one or more of the parties to the dispute.

ARTICLE 16. Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

ARTICLE 17. In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of Membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council.

Upon such invitation being given the Council shall immediately institute an inquiry into the circumstances of the dispute and recommend such action as may seem best and most effectual in the circumstances.

If a State so invited shall refuse to accept the obligations of Membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provisions of Article 16 shall be applicable as against the State taking such action.

If both parties to the dispute when so invited refuse to accept the obligations of Membership in the League for the purposes of such dispute, the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute.

2. THE GENEVA PROTOCOL OF OCTOBER 2, 1924[1]

Animated by the firm desire to ensure the maintenance of general peace and the security of nations whose existence, independence or territories may be threatened;

Recognising the solidarity of the members of the international community;

Asserting that a war of aggression constitutes a violation of this solidarity and an international crime;

Desirous of facilitating the complete application of the system provided in the Covenant of the League of Nations for the pacific settlement of disputes between States and of ensuring the repression of international crimes; and

For the purpose of realising, as contemplated by Article 8 of the Covenant, the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations;

The undersigned, duly authorised to that effect, agree as follows:

ARTICLE 1. The signatory States undertake to make every effort in their power to secure the introduction into the Covenant of amendments on the lines of the provisions contained in the following articles.

They agree that, as between themselves, these provisions shall be binding as from the coming into force of the present Protocol and that, so far as they are concerned, the Assembly and the Council of the League of Nations shall thenceforth have power to exercise all the rights and perform all the duties conferred upon them by the Protocol.

ARTICLE 2. The signatory States agree in no case to resort to war either with one another or against a State which, if the occasion arises, accepts all the obligations hereinafter set out, except in case of resistance to acts of aggression or when acting in agreement with the Council or the Assembly of the League of Nations in accordance with the provisions of the Covenant and of the present Protocol.

ARTICLE 3. The signatory States undertake to recognise as compulsory, *ipso facto* and without special agreement, the jurisdiction of the Permanent Court of International Justice

[1] League of Nations Official Journal, Special Supplement No. 21 (October 1924), p. 21. The protocol has also been printed, together with the general report of the first and third committees of the Assembly, and the resolutions adopted by the Assembly on Oct. 2, 1924, as a British parliamentary paper, Misc. No. 18 (1924).

in the cases covered by paragraph 2 of Article 36 of the Statute of the Court, but without prejudice to the right of any State, when acceding to the special protocol provided for in the said Article and opened for signature on December 16th, 1920, to make reservations compatible with the said clause.

Accession to this special protocol, opened for signature on December 16th, 1920, must be given within the month following the coming into force of the present Protocol.

States which accede to the present Protocol, after its coming into force must carry out the above obligation within the month following their accession.

ARTICLE 4. With a view to render more complete the provisions of paragraphs 4, 5, 6, and 7 of Article 15 of the Covenant, the signatory States agree to comply with the following procedure:

1. If the dispute submitted to the Council is not settled by it as provided in paragraph 3 of the said Article 15, the Council shall endeavour to persuade the parties to submit the dispute to judicial settlement or arbitration.

2. (a) If the parties cannot agree to do so, there shall, at the request of at least one of the parties, be constituted a Committee of Arbitrators. The Committee shall so far as possible be constituted by agreement between the parties.

(b) If within the period fixed by the Council the parties have failed to agree, in whole or in part, upon the number, the names and the powers of the arbitrators and upon the procedure, the Council shall settle the points remaining in suspense. It shall with the utmost possible despatch select in consultation with the parties the arbitrators and their President from among persons who by their nationality, their personal character and their experience, appear to it to furnish the highest guarantees of competence and impartiality.

(c) After the claims of the parties have been formulated, the Committee of Arbitrators, on the request of any party, shall through the medium of the Council request an advisory opinion upon any points of law in dispute from the Permanent Court of International Justice, which in such case shall meet with the utmost possible despatch.

3. If none of the parties asks for arbitration, the Council shall again take the dispute under consideration. If the Council reaches a report which is unanimously agreed to by the members thereof other than the representatives of any of the parties to the dispute, the signatory States agree to comply with the recommendations therein.

4. If the Council fails to reach a report which is concurred in by all its members, other than the representatives of any of the parties to the dispute, it shall submit the dispute to arbitration. It shall itself determine the composition, the powers and the procedure of the Committee of Arbitrators and, in the choice of the arbitrators, shall bear in mind the guarantees of competence and impartiality referred to in paragraph 2 (b) above.

5. In no case may a solution, upon which there has already been a unanimous recommendation of the Council accepted by one of the parties concerned, be again called in question.

6. The signatory States undertake that they will carry out in full good faith any judicial sentence or arbitral award that may be rendered and that they will comply, as provided in paragraph 3 above, with the solutions recommended by the Council. In the event of a State failing to carry out the above undertakings, the Council shall exert all its influence to secure compliance therewith. If it fails therein, it shall propose what steps should be taken to give effect thereto, in accordance with the provision contained at the end of Article 13 of the Covenant. Should a State in disregard of the above undertakings resort to war, the sanctions provided for by Article 16 of the Covenant, interpreted in the manner indicated in the present Protocol, shall immediately become applicable to it.

7. The provisions of the present Article do not apply to the settlement of disputes which arise as the result of measures of War taken by one or more signatory States in agreement with the Council or the Assembly.

ARTICLE 5. The provisions of paragraph 8 of Article 15 of the Covenant shall continue to apply in proceedings before the Council.

If in the course of an arbitration, such as is contemplated in Article 4 above, one of the

parties claims that the dispute, or part thereof, arises out of a matter which by international law is solely within the domestic jurisdiction of that party, the arbitrators shall on this point take the advice of the Permanent Court of International Justice through the medium of the Council. The opinion of the Court shall be binding upon the arbitrators, who, if the opinion is affirmative, shall confine themselves to so declaring in their award.

If the question is held by the Court or by the Council to be a matter solely within the domestic jurisdiction of the State, this decision shall not prevent consideration of the situation by the Council or by the Assembly under Article 11 of the Covenant.

ARTICLE 6. If in accordance with paragraph 9 of Article 15 of the Covenant a dispute is referred to the Assembly, that body shall have for the settlement of the dispute all the powers conferred upon the Council as to endeavouring to reconcile the parties in the manner laid down in paragraphs 1, 2 and 3 of Article 15 of the Covenant and in paragraph 1 of Article 4 above.

Should the Assembly fail to achieve an amicable settlement:

If one of the parties asks for arbitration, the Council shall proceed to constitute the Committee of Arbitrators in the manner provided in sub-paragraphs (a), (b) and (c) of paragraph 2 of Article 4 above.

If no party asks for arbitration, the Assembly shall again take the dispute under consideration and shall have in this connection the same powers as the Council. Recommendations embodied in a report of the Assembly, provided that it secures the measure of support stipulated at the end of paragraph 10 of Article 15 of the Covenant, shall have the same value and effect, as regards all matters dealt with in the present Protocol, as recommendations embodied in a report of the Council adopted as provided in paragraph 3 of Article 4 above.

If the necessary majority cannot be obtained, the dispute shall be submitted to arbitration and the Council shall determine the composition, the powers and the procedure of the Committee of Arbitrators as laid down in paragraph 4 of Article 4 above.

ARTICLE 7. In the event of a dispute arising between two or more signatory States, these States agree that they will not, either before the dispute is submitted to proceedings for pacific settlement or during such proceedings, make any increase of their armaments or effectives which might modify the position established by the Conference for the Reduction of Armaments provided for by Article 17 of the present Protocol, nor will they take any measure of military, naval, air, industrial or economic mobilisation, nor, in general, any action of a nature likely to extend the dispute or render it more acute.

It shall be the duty of the Council, in accordance with the provisions of Article 11 of the Covenant, to take under consideration any complaint as to infraction of the above undertakings which is made to it by one or more of the States parties to the dispute. Should the Council be of opinion that the complaint requires investigation, it shall, if it deems it expedient, arrange for enquiries and investigations in one or more of the countries concerned. Such enquiries and investigations shall be carried out with the utmost possible despatch and the signatory States undertake to afford every facility for carrying them out.

The sole object of measures taken by the Council as above provided is to facilitate the pacific settlement of disputes and they shall in no way prejudge the actual settlement.

If the result of such enquiries and investigations is to establish an infraction of the provisions of the first paragraph of the present Article, it shall be the duty of the Council to summon the State or States guilty of the infraction to put an end thereto. Should the State or States in question fail to comply with such summons, the Council shall declare them to be guilty of a violation of the Covenant or of the present Protocol, and shall decide upon the measures to be taken with a view to end as soon as possible a situation of a nature to threaten the peace of the world.

For the purposes of the present Article decisions of the Council may be taken by a two-thirds majority.

ARTICLE 8. The signatory States undertake to abstain from any act which might constitute a threat of aggression against another State.

If one of the signatory States is of opinion that another State is making preparations for war, it shall have the right to bring the matter to the notice of the Council.

The Council, if it ascertains that the facts are as alleged, shall proceed as provided in paragraphs 2, 4, and 5 of Article 7.

ARTICLE 9. The existence of demilitarised zones being calculated to prevent aggression and to facilitate a definite finding of the nature provided for in Article 10 below, the establishment of such zones between States mutually consenting thereto is recommended as a means of avoiding violations of the present Protocol.

The demilitarised zones already existing under the terms of certain treaties or conventions, or which may be established in future between States mutually consenting thereto, may at the request and at the expense of one or more of the conterminous States, be placed under a temporary or permanent system of supervision to be organised by the Council.

ARTICLE 10. Every State which resorts to war in violation of the undertakings contained in the Covenant or in the present Protocol is an aggressor. Violation of the rules laid down for a demilitarised zone shall be held equivalent to resort to war.

In the event of hostilities having broken out, any State shall be presumed to be an aggressor, unless a decision of the Council, which must be taken unanimously, shall otherwise declare:

1. If it has refused to submit the dispute to the procedure of pacific settlement provided by Articles 13 and 15 of the Covenant as amplified by the present Protocol, or to comply with a judicial sentence or arbitral award or with a unanimous recommendation of the Council, or has disregarded a unanimous report of the Council, a judicial sentence or an arbitral award recognising that the dispute between it and the other belligerent State arises out of a matter which by international law is solely within the domestic jurisdiction of the latter State; nevertheless, in the last case the State shall only be presumed to be an aggressor if it has not previously submitted the question to the Council or the Assembly, in accordance with Article 11 of the Covenant.

2. If it has violated provisional measures enjoined by the Council for the period while the proceedings are in progress as contemplated by Article 7 of the present Protocol.

Apart from the cases dealt with in paragraphs 1 and 2 of the present Article, if the Council does not at once succeed in determining the aggressor, it shall be bound to enjoin upon the belligerents an armistice, and shall fix the terms, acting, if need be, by a two-thirds majority and shall supervise its execution.

Any belligerent which has refused to accept the armistice or has violated its terms shall be deemed an aggressor.

The Council shall call upon the signatory States to apply forthwith against the aggressor the sanctions provided by Article 11 of the present Protocol, and any signatory State thus called upon shall thereupon be entitled to exercise the rights of a belligerent.

ARTICLE 11. As soon as the Council has called upon the signatory States to apply sanctions, as provided in the last paragraph of Article 10 of the present Protocol, the obligations of the said States, in regard to the sanctions of all kinds mentioned in paragraphs 1 and 2 of Article 16 of the Covenant, will immediately become operative in order that such sanctions may forthwith be employed against the aggressor.

Those obligations shall be interpreted as obliging each of the signatory States to co-operate loyally and effectively in support of the Covenant of the League of Nations, and in resistance to any act of aggression, in the degree which its geographical position and its particular situation as regards armaments allow.

In accordance with paragraph 3 of Article 16 of the Covenant the signatory States give a joint and several undertaking to come to the assistance of the State attacked or threatened, and to give each other mutual support by means of facilities and reciprocal exchanges as regards the provision of raw materials and supplies of every kind, openings of credits, transport and transit, and for this purpose to take all measures in their power to preserve the safety of communications by land and by sea of the attacked or threatened State.

If both parties to the dispute are aggressors within the meaning of Article 10, the economic and financial sanctions shall be applied to both of them.

ARTICLE 12. In view of the complexity of the conditions in which the Council may be called upon to exercise the functions mentioned in Article 11 of the present Protocol concerning economic and financial sanctions, and in order to determine more exactly the guarantees afforded by the present Protocol to the signatory States, the Council shall forthwith invite the economic and financial organisations of the League of Nations to consider and report as to the nature of the steps to be taken to give effect to the financial and economic sanctions and measures of co-operation contemplated in Article 16 of the Covenant and in Article 11 of this Protocol.

When in possession of this information, the Council shall draw up through its competent organs:

1. Plans of action for the application of the economic and financial sanctions against an aggressor State;

2. Plans of economic and financial co-operation between a State attacked and the different States assisting it;

and shall communicate these plans to the Members of the League and to the other signatory States.

ARTICLE 13. In view of the contingent military, naval and air sanctions provided for by Article 16 of the Covenant and by Article 11 of the present Protocol, the Council shall be entitled to receive undertakings from States determining in advance the military, naval and air forces which they would be able to bring into action immediately to ensure the fulfilment of the obligations in regard to sanctions which result from the Covenant and the present Protocol.

Furthermore, as soon as the Council has called upon the signatory States to apply sanctions, as provided in the last paragraph of Article 10 above, the said States may, in accordance with any agreements which they may previously have concluded, bring to the assistance of a particular State, which is the victim of aggression, their military, naval and air forces.

The agreements mentioned in the preceding paragraph shall be registered and published by the Secretariat of the League of Nations. They shall remain open to all States Members of the League which may desire to accede thereto.

ARTICLE 14. The Council shall alone be competent to declare that the application of sanctions shall cease and normal conditions be re-established.

ARTICLE 15. In conformity with the spirit of the present Protocol, the signatory States agree that the whole cost of any military, naval or air operations undertaken for the repression of an aggression under the terms of the Protocol, and reparation for all losses suffered by individuals, whether civilians or combatants, and for all material damage caused by the operations of both sides, shall be borne by the aggressor State up to the extreme limit of its capacity.

Nevertheless, in view of Article 10 of the Covenant, neither the territorial integrity nor the political independence of the aggressor State shall in any case be affected as the result of the application of the sanctions mentioned in the present Protocol.

ARTICLE 16. The signatory States agree that in the event of a dispute between one or more of them and one or more States which have not signed the present Protocol and are not Members of the League of Nations, such non-Member States shall be invited, on the conditions contemplated in Article 17 of the Covenant, to submit, for the purpose of a pacific settlement, to the obligations accepted by the States signatories of the present Protocol.

If the State so invited, having refused to accept the said conditions and obligations, resorts to war against a signatory State, the provisions of Article 16 of the Covenant, as defined by the present Protocol, shall be applicable against it.

ARTICLE 17. The signatory States undertake to participate in an International Conference for the Reduction of Armaments which shall be convened by the Council and shall meet

at Geneva on Monday, June 15th, 1925. All other States, whether Members of the League or not, shall be invited to this Conference.

In preparation for the convening of the Conference, the Council shall draw up with due regard to the undertakings contained in Articles 11 and 13 of the present Protocol, a general programme for the reduction and limitation of armaments, which shall be laid before the Conference and which shall be communicated to the Governments at the earliest possible date, and at the latest three months before the Conference meets.

If by May 1st, 1925, ratifications have not been deposited by at least a majority of the permanent Members of the Council and ten other Members of the League, the Secretary-General of the League shall immediately consult the Council as to whether he shall cancel the invitations or merely adjourn the Conference to a subsequent date to be fixed by the Council so as to permit the necessary number of ratifications to be obtained.

ARTICLE 18. Wherever mention is made in Article 10, or in any other provision of the present Protocol, of a decision of the Council, this shall be understood in the sense of Article 15 of the Covenant, namely that the votes of the representatives of the parties to the dispute shall not be counted when reckoning unanimity or the necessary majority.

ARTICLE 19. Except as expressly provided by its terms, the present Protocol shall not affect in any way the rights and obligations of Members of the League as determined by the Covenant.

ARTICLE 20. Any dispute as to the interpretation of the present Protocol shall be submitted to the Permanent Court of International Justice.

ARTICLE 21. The present Protocol, of which the French and English texts are both authentic, shall be ratified.

The deposit of ratifications shall be made at the Secretariat of the League of Nations as soon as possible.

States of which the seat of government is outside Europe will be entitled merely to inform the Secretariat of the League of Nations that their ratification has been given; in that case, they must transmit the instrument of ratification as soon as possible.

So soon as the majority of the permanent Members of the Council and ten other Members of the League have deposited or have effected their ratifications, a *procès-verbal* to that effect shall be drawn up by the Secretariat.

After the said *procès-verbal* has been drawn up, the Protocol shall come into force as soon as the plan for the reduction of armaments has been adopted by the Conference provided for in Article 17.

If within such period after the adoption of the plan for the reduction of armaments as shall be fixed by the said Conference, the plan has not been carried out, the Council shall make a declaration to that effect; this declaration shall render the present Protocol null and void.

The grounds on which the Council may declare that the plan drawn up by the International Conference for the Reduction of Armaments has not been carried out, and that in consequence the present Protocol has been rendered null and void, shall be laid down by the Conference itself.

A signatory State which, after the expiration of the period fixed by the Conference, fails to comply with the plan adopted by the Conference, shall not be admitted to benefit by the provisions of the present Protocol.

In faith whereof the Undersigned, duly authorised for this purpose, have signed the present Protocol.

Done at Geneva, on the second day of October, nineteen hundred and twenty-four, in a single copy, which will be kept in the archives of the Secretariat of the League and registered by it on the date of its coming into force.

3. TREATY OF MUTUAL GUARANTEE, LOCARNO, OCTOBER 16, 1925[1]

The President of the German Reich, His Majesty the King of the Belgians, the President of the French Republic, and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, His Majesty the King of Italy;

Anxious to satisfy the desire for security and protection which animates the peoples upon whom fell the scourge of the war of 1914–18;

Taking note of the abrogation of the treaties for the neutralization of Belgium, and conscious of the necessity of ensuring peace in the area which has so frequently been the scene of European conflicts;

Animated also with the sincere desire of giving to all the signatory Powers concerned supplementary guarantees within the framework of the Covenant of the League of Nations and the treaties in force between them;

Have determined to conclude a treaty with these objects, and have appointed as their plenipotentiaries:

[Here follow the names of the plenipotentiaries.]

Who, having communicated their full powers, found in good and due form, have agreed as follows:

ARTICLE 1. The high contracting parties collectively and severally guarantee, in the manner provided in the following articles, the maintenance of the territorial *status quo* resulting from the frontiers between Germany and Belgium and between Germany and France and the inviolability of the said frontiers as fixed by or in pursuance of the Treaty of Peace signed at Versailles on the 28th June, 1919, and also the observance of the stipulations of Articles 42 and 43 of the said treaty concerning the demilitarized zone.

ARTICLE 2. Germany and Belgium, and also Germany and France, mutually undertake that they will in no case attack or invade each other or resort to war against each other.

This stipulation shall not, however, apply in the case of—

1. The exercise of the right of legitimate defence, that is to say, resistance to a violation of the undertaking contained in the previous paragraph or to a flagrant breach of Articles 42 or 43 of the said Treaty of Versailles, if such breach constitutes an unprovoked act of aggression and by reason of the assembly of armed forces in the demilitarized zone immediate action is necessary.

2. Action in pursuance of Article 16 of the Covenant of the League of Nations.

3. Action as the result of a decision taken by the Assembly or by the Council of the League of Nations or in pursuance of Article 15, paragraph 7, of the Covenant of the League of Nations, provided that in this last event the action is directed against a state which was the first to attack.

ARTICLE 3. In view of the undertakings entered into in Article 2 of the present treaty, Germany and Belgium and Germany and France undertake to settle by peaceful means and in the manner laid down herein all questions of every kind which may arise between them and which it may not be possible to settle by the normal methods of diplomacy:

Any question with regard to which the parties are in conflict as to their respective rights shall be submitted to judicial decision, and the parties undertake to comply with such decision.

All other questions shall be submitted to a conciliation commission. If the proposals of this commission are not accepted by the two parties, the question shall be brought before the Council of the League of Nations, which will deal with it in accordance with Article 15 of the Covenant of the League.

The detailed arrangements for effecting such peaceful settlement are the subject of special agreements signed this day.

ARTICLE 4. 1. If one of the high contracting parties alleges that a violation of Article 2 of

[1] American Journal of International Law, Supplement, 1926, p. 22.

the present treaty or a breach of Articles 42 or 43 of the Treaty of Versailles has been or is being committed, it shall bring the question at once before the Council of the League of Nations.

2. As soon as the Council of the League of Nations is satisfied that such violation or breach has been committed, it will notify its finding without delay to the Powers signatory of the present treaty, who severally agree that in such case they will each of them come immediately to the assistance of the Power against whom the act complained of is directed.

3. In case of a flagrant violation of Article 2 of the present treaty or of a flagrant breach of Articles 42 or 43 of the Treaty of Versailles by one of the high contracting parties, each of the other contracting parties hereby undertakes immediately to come to the help of the party against whom such a violation or breach has been directed as soon as the said Power has been able to satisfy itself that this violation constitutes an unprovoked act of aggression and that by reason either of the crossing of the frontier or of the outbreak of hostilities or of the assembly of armed forces in the demilitarized zone immediate action is necessary. Nevertheless, the Council of the League of Nations, which will be seized of the question in accordance with the first paragraph of this article, will issue its findings, and the high contracting parties undertake to act in accordance with the recommendations of the Council provided that they are concurred in by all the members other than the representatives of the parties which have engaged in hostilities.

ARTICLE 5. The provisions of Article 3 of the present treaty are placed under the guarantee of the high contracting parties as provided by the following stipulations:

If one of the Powers referred to in Article 3 refuses to submit a dispute to peaceful settlement or to comply with an arbitral or judicial decision and commits a violation of Article 2 of the present treaty or a breach of Articles 42 or 43 of the Treaty of Versailles, the provisions of Article 4 shall apply.

Where one of the Powers referred to in Article 3 without committing a violation of Article 2 of the present treaty or a breach of Articles 42 or 43 of the Treaty of Versailles, refuses to submit a dispute to peaceful settlement or to comply with an arbitral or judicial decision, the other party shall bring the matter before the Council of the League of Nations, and the Council shall propose what steps shall be taken; the high contracting parties shall comply with these proposals.

ARTICLE 6. The provisions of the present treaty do not affect the rights and obligations of the high contracting parties under the Treaty of Versailles or under arrangements supplementary thereto, including the agreements signed in London on the 30th August, 1924.

ARTICLE 7. The present treaty, which is designed to ensure the maintenance of peace, and is in conformity with the Covenant of the League of Nations, shall not be interpreted as restricting the duty of the League to take whatever action may be deemed wise and effectual to safeguard the peace of the world.

ARTICLE 8. The present treaty shall be registered at the League of Nations in accordance with the Covenant of the League. It shall remain in force until the Council, acting on a request of one or other of the high contracting parties notified to the other signatory Powers three months in advance, and voting at least by a two-thirds' majority, decides that the League of Nations ensures sufficient protection to the high contracting parties; the treaty shall cease to have effect on the expiration of a period of one year from such decision.

ARTICLE 9. The present treaty shall impose no obligation upon any of the British dominions, or upon India, unless the government of such dominion, or of India, signifies its acceptance thereof.

ARTICLE 10. The present treaty shall be ratified and the ratifications shall be deposited at Geneva in the archives of the League of Nations as soon as possible.

It shall enter into force as soon as all the ratifications have been deposited and Germany has become a member of the League of Nations.

The present treaty, done in a single copy, will be deposited in the archives of the League of

Nations, and the Secretary-General will be requested to transmit certified copies to each of the high contracting parties.

In faith whereof the above-mentioned plenipotentiaries have signed the present treaty.

Done at Locarno, the 16th October, 1925.

4. BORAH'S RESOLUTION BEFORE THE UNITED STATES SENATE, DECEMBER 12, 1927[1]

Whereas war is the greatest existing menace to society, and has become so expensive and destructive that it not only causes the stupendous burdens of taxation now afflicting our people but threatens to engulf and destroy civilization; and

Whereas civilization has been marked in its upward trend out of barbarism into its present condition by the development of law and courts to supplant methods of violence and force; and

Whereas the genius of civilization has discovered but two methods of compelling the settlement of human disputes, namely, law and war, and therefore, in any plan for the compulsory settlement of international controversies, we must choose between war on the one hand and the process of law on the other; and

Whereas war between nations has always been and still is a lawful institution, so that any nation may, with or without cause, declare war against any other nation and be strictly within its legal rights; and

Whereas revolutionary war or wars of liberation are illegal and criminal, to wit, high treason, whereas, under existing international law, wars between nations to settle disputes are perfectly lawful; and

Whereas the overwhelming moral sentiment of civilized people everywhere is against the cruel and destructive institution of war; and

Whereas all alliances, leagues, or plans which rely upon war as the ultimate power for the enforcement of peace carry the seeds either of their own destruction or of military dominancy to the utter subversion of liberty and justice; and

Whereas we must recognize the fact that resolutions or treaties outlawing certain methods of killing will not be effective so long as war itself remains lawful; and that in international relations we must have not rules and regulations of war but organic laws against war; and

Whereas in our Constitutional Convention of 1787 it was successfully contended by Madison, Hamilton, and Ellsworth that the use of force when applied to people collectively—that is, to states or nations—was unsound in principle and would be tantamount to a declaration of war; and

Whereas we have in our Federal Supreme Court a practical and effective model for a real international court, as it has specific jurisdiction to hear and decide controversies between our sovereign States; and

Whereas our Supreme Court has exercised this jurisdiction without resort to force for 137 years, during which time scores of controversies have been judicially and peaceably settled that might otherwise have led to war between the States, and thus furnishes a practical exemplar for the compulsory and pacific settlement of international controversies; and

Whereas an international arrangement of such judicial character would not shackle the independence or impair the sovereignty of any nation: Now therefore be it

Resolved, That it is the view of the Senate of the United States that war between nations should be outlawed as an institution or means for the settlement of international controversies by making it a public crime under the law of nations and that every nation should be encouraged by solemn agreement or treaty to bind itself to indict and punish its own international war breeders or instigators and war profiteers under powers similar to those

[1] Congressional Record, vol. 69, pt. 1, p. 477 (Washington, Government Printing Office, 1928).

conferred upon our Congress under Article I, section 8, of our Federal Constitution, which clothes the Congress with the power "to define and punish offenses against the law of nations"; and be it

Resolved further, That a code of international law of peace based upon the outlawing of war and on the principle of equality and justice between all nations, amplified and expanded and adapted and brought down to date, should be created and adopted.

Second, that, with war outlawed, a judicial substitute for war should be created (or, if existing in part, adapted and adjusted) in the form or nature of an international court, modeled on our Federal Supreme Court in its jurisdiction over controversies between our sovereign States; such court shall possess affirmative jurisdiction to hear and decide all purely international controversies, as defined by the code, or arising under treaties, and its judgments shall not be enforced by war under any name or in any form whatever, but shall have the same power for their enforcement as our Federal Supreme Court, namely, the respect of all enlightened nations for judgments resting upon open and fair investigations and impartial decisions, the agreement of the nations to abide and be bound by such judgments and the compelling power of enlightened public opinion.

5. THE KELLOGG PACT OF AUGUST 27, 1928[1]

The President of the German Reich, the President of the United States of America, His Majesty the King of the Belgians, the President of the French Republic, His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Poland, the President of the Czechoslovak Republic,

Deeply sensible of their solemn duty to promote the welfare of mankind;

Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;

Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty;

Hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavor and by adhering to the present Treaty as soon as it comes into force bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy;

Have decided to conclude a Treaty and for that purpose have appointed as their respective Plenipotentiaries:

[Here follow the names of the Plenipotentiaries.]

who, having communicated to one another their full powers found in good and due form have agreed upon the following articles:

ARTICLE 1. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

ARTICLE 2. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

ARTICLE 3. The present Treaty shall be ratified by the High Contracting Parties named

[1] The General Pact for the Renunciation of War (Washington, Government Printing Office, 1928).

in the Preamble in accordance with their respective constitutional requirements, and shall take effect as between them as soon as all their several instruments of ratification shall have been deposited at Washington.

This Treaty shall, when it has come into effect as prescribed in the preceding paragraph, remain open as long as may be necessary for adherence by all the other Powers of the world. Every instrument evidencing the adherence of a Power shall be deposited at Washington and the Treaty shall immediately upon such deposit become effective as between the Power thus adhering and the other Powers parties hereto.

It shall be the duty of the Government of the United States to furnish each Government named in the Preamble and every Government subsequently adhering to this Treaty with a certified copy of the Treaty and of every instrument of ratification or adherence. It shall also be the duty of the Government of the United States telegraphically to notify such Governments immediately upon the deposit with it of each instrument of ratification or adherence.

In faith whereof the respective Plenipotentiaries have signed this Treaty in the French and English languages both texts having equal force, and hereunto affix their seals.

Done at Paris, the twenty-seventh day of August in the year one thousand nine hundred and twenty-eight.

6. THE LITVINOFF PROTOCOL OF FEBRUARY 9, 1929[1]

The Government of the Esthonian Republic, the President of the Latvian Republic, the President of the Polish Republic, His Majesty the King of Rumania, the Central Executive Committee of the Union of Socialist Soviet Republics, moved by the desire to contribute to the consolidation of peace which exists between their countries and to bring into force as speedily as possible between the peoples of these countries the treaty for the renunciation of war as an instrument of national policy, signed in Paris on August 27th, 1928, have decided to realise the above intentions by means of this Protocol, and have appointed as mandatories:

[Here follow the names of the mandatories.]

who, after an exchange of credentials drawn up in the recognised form, have agreed as follows.

CLAUSE I. The Treaty for the Renunciation of War as an instrument of national policy, signed in Paris on August 27th, 1928, a copy of which is hereby appended[2] as an organic part of this Protocol, to come into force between the Contracting Parties after the ratification of the afore-mentioned 1928 Paris Treaty by the proper legal authorities of the respective Contracting Parties.

CLAUSE II. The coming into force of the 1928 Paris Treaty, provided for by this Protocol, in the relations between the participants of this Protocol will be valid regardless of the coming into force of the 1928 Paris Treaty, as stated in Clause III of the latter.

CLAUSE III.—1. This Protocol to be ratified by the proper legal authorities of the Contracting Parties, according to their respective constitutions.

2. The Ratification Charters to be handed over by each of the Contracting Parties for safe keeping to the Government of the Union of Socialist Soviet Republics within a week from the day of the ratification of this Protocol, by the respective Contracting Party.

3. From the day of the handing over for safe keeping of the Ratification Charters by two of the Contracting Parties, this Protocol comes into force between these two Parties. In the relations between the remaining Contracting Parties and States for which the Protocol has already come into force, it will come into force as they hand over their Ratification Charters for safe keeping.

[1] The Soviet Union and Peace. The most important of the documents issued by the Government of the U.S.S.R. concerning peace and disarmament from 1917 to 1929. With an introduction by Henri Barbusse (London, Martin Lawrence), p. 258.

[2] Not printed in this publication.

4. The Government of the Union of Socialist Soviet Republics will immediately inform all the signatories of this Protocol about every handing over of Ratification Charters for safe keeping.

CLAUSE IV. To make valid Clause I of this Protocol, each Contracting Party immediately after the ratification of the 1928 Paris Treaty by its legislative organs informs of this the Union of Socialist Soviet Republics and the other participants of this Protocol through diplomatic channels.

CLAUSE V. The Governments of all countries are at liberty to adhere to this Protocol. Notification of final adherence must be made to the Government of the Union of Socialist Soviet Republics which will inform all the other participants of this Protocol about this adherence. From the moment of the receipt of the said information *re* adherence, this Protocol will come into force in the relations between the newly adhering State and all the other participants of this Protocol.

CLAUSE VI. The coming into force on the basis of this Protocol of the 1928 Paris Treaty in the relations between the newly adhering State and all the other participants of this Protocol must take place in the order indicated in Clause IV of this Protocol.

CLAUSE VII. This Protocol is drawn up in one copy an authentic specimen of which has been communicated by the Government of the Union of Socialist Soviet Republics to every signatory or adhering State.

In confirmation of this, the above-mentioned Mandatories have signed this Protocol, affixing to it their seals.

Executed, Moscow, on February 9th, 1929.

7. RECOMMENDATIONS OF THE COMMITTEE OF THE COUNCIL CONCERNING ARTICLE 11 OF THE COVENANT, APPROVED MARCH 15, 1927[1]

Methods or Regulations which would enable the Council to take such Decisions as may be necessary to enforce the Obligations of the Covenant as expeditiously as possible

I. PRELIMINARY

(a) The Committee has not been asked to give an authentic interpretation of Article 11 of the Covenant, or even to draw up a complete code of procedure for the application of this provision. It has simply to make recommendations regarding the action that may be deemed wise and effectual for the purpose of carrying into effect the provisions of that article. The recommendations which follow are based on:

(1) Past practice;

(2) Previous resolutions of the Assembly and Council;

(3) The proceedings of these bodies and of various committees formed by the League of Nations.

It should be clearly understood that the measures referred to below are only cited as examples, and that the Committee does not wish to underrate or dispute the value of any which it may not have expressly mentioned. It is impossible to draw up in advance any rigid classification of the infinite variety of events which occur in international political life. Nor is it possible, by resolutions, recommendations or suggestions, to prescribe limits to the extensive rights which the League holds in virtue of its essential duty, that of effectually safeguarding the peace of nations. Among the measures recommended will be found those which, having been favourably received, and having already been successfully applied, appear particularly effectual. The list of these measures will doubtless be added to as further experience is gained.

(b) If the action to be taken under Article 11 is of particular concern to States which are

[1] League of Nations Official Journal, July 1927, p. 832.

not Members of the Council, such States must, under the terms of paragraph 5 of Article 4, be given a seat on the Council. The procedure instituted under Article 11 in no way implies the exclusion of procedure taken under other provisions of the Covenant. The Aaland Islands question, for example, was referred to the Council by the British Empire in virtue of Article 11; this did not, however, prevent the Council from declaring itself competent under Article 4, paragraph 4, and at the same time applying as far as possible Articles 12, 15 and 17.

Thus, if any action contemplated by the Council as being calculated to preserve peace is taken under the provisions of Article 15, the votes of the representatives of the parties will not count for purposes of unanimity as far as such action is concerned. The report referred to in Article 15, paragraph 6, may, of course, contain any recommendations which the Council may think likely to bring about a settlement of the dispute and prevent a rupture.

(c) If the threat of war did not arise out of a dispute coming under Article 15, the Members of the Council not directly concerned in the dispute would still be free to make recommendations, which could not fail to have a considerable moral value.

(d) Under Article 11, any war or threat of war is declared to be a matter of concern to the whole League, and the League is directed to take any action that may be deemed wise and effectual to safeguard the peace of nations. If there is no threat of war, but some circumstance threatens to disturb the good understanding between nations upon which peace depends, that circumstance may be brought to the attention of the Assembly or the Council by any Member of the League so that presumably the Assembly or Council may consider what, if anything, should be done to restore international good understanding.

II. Where There Is No Threat of War or It Is Not Acute

(a) The Council will consider the question at a meeting, to be called specially if necessary, to which the contending parties will be summoned.

(b) The Council can request an organisation, or even a private individual, appointed by it to exercise conciliatory action on the parties.

(c) The Council may also suggest that the dispute be referred to arbitration or judicial settlement, in accordance with the provisions of Article 13 of the Covenant.

(d) If there is a doubt as to the facts of the dispute, a League Commission may be sent to the *locus in quo* to ascertain what has actually happened or is likely to happen. It is understood that such a Commission cannot go to the territory of either party without the consent of the State to which that territory belongs.

(e) If, for the accomplishment of its task, the Council deems it necessary, it can, in certain appropriate cases, ask for an advisory opinion from the Permanent Court, or else, in certain special circumstances, from a Committee of Jurists appointed by it.

III. Where There Is an Imminent Threat of War

(a) Everything should be done to ensure that the Council shall meet with the greatest promptitude. In this connection the Committee refers to the recommendations which it made in its previous report on these questions (Document C.677.M.268.1926.IX, dated December 4th, 1926).[1]

(b) Even before the Council meets, it is desirable that the Acting President should send telegraphic appeals to the parties to the dispute to refrain forthwith from any hostile acts. The nature of this appeal will necessarily vary with the circumstances of each case.

If, owing to exceptional circumstances, the Secretary-General considered that the Acting President was not in a position to act, he might request the ex-President most recently in office who is available to take this step in the name of the Council.

(c) As soon as the Council meets, it will no doubt verbally urge on the representatives of the nations in dispute the great importance of avoiding a breach of the peace.

(d) Further, the Council may take steps to see that the *status quo ante* is not disturbed in

[1] See Official Journal, February 1927, p. 221.

such manner as to aggravate or extend the dispute and thus to compromise the pacific settlement thereof. For this purpose it may indicate to the parties any movements of troops, mobilisation operations and other similar measures from which it recommends them to abstain.

Similar measures of an industrial, economic or financial nature may also be recommended. The Council may request the parties to notify their agreement on these points within the shortest possible space of time, the length of which will, if necessary, be fixed by the Council.

The details of these measures, and even their nature, obviously depend upon the whole of the circumstances of the dispute. It should be mentioned that, in certain cases with which it has had to deal, the Council fixed a neutral zone on either side, from which the parties to the dispute were called upon to withdraw their troops.

(e) In order to satisfy itself of the way in which these measures have been carried out and to keep itself informed of the course of events, the Council may think it desirable to send representatives to the locality of the dispute. The Secretary-General, duly authorised by the Council, would keep lists of experts—political, economic, military, etc.—on the basis of lists supplied by the States Members of the League and of applications for employment submitted direct to him. These lists, classified according to categories, would be held by the Secretary-General at the disposal of the Council, which, in case of crisis, would thus have names of suitable experts before it. The Council may also have recourse in this connection to diplomatic personages stationed in the neighbourhood who belong to States not parties to the dispute.

(f) Should any of the parties to the dispute disregard the advice or recommendations of the Council, the Council will consider the measures to be taken. It may manifest its formal disapproval. It may also recommend to its Members to withdraw all their diplomatic representatives accredited to the State in question, or certain categories of them. It may also recommend other measures of a more serious character.

(g) If the State in default still persists in its hostile preparations or action, further warning measures may be taken, such as a naval demonstration. Naval demonstrations have been employed for such a purpose in the past. It is possible that air demonstrations might within reasonable limits be employed. Other measures may be found suitable according to the circumstances of each case.

IV. General

(a) It should be pointed out that the very general terms of Article 11: "any action that may be deemed wise and effectual to safeguard the peace of nations"—allow of any action which does not imply recourse to war against the recalcitrant State. The above-mentioned measures have only been given as examples. Circumstances might lead to an alteration in the order of their application.

(b) In taking any of the above-mentioned measures, the Council will, of course, not lose sight of the distinction made in Article 11 between paragraph 1, which deals with "threats of war," and paragraph 2, which deals with "circumstances . . . which threaten to disturb . . . the good understanding between nations."

(c) In any case contemplated above, the Members of the League not represented at the Council should be kept fully informed. Where necessary or desirable, their collaboration with the Council might be sought, either by sending a communication to each of them or by summoning a special meeting of the Assembly.

(d) In the case of disputes between Member States and non-Member States, or between non-Member States, Article 11 will be applied by the Council in the light of the above observations and bearing in mind the circumstances of each case.

(e) If, in spite of all steps here recommended, a "resort to war" takes place, it is probable that events will have made it possible to say which State is the aggressor, and in consequence it will be possible to enforce more rapidly and effectively the provisions of Article 16.

8. MODEL TREATY TO STRENGTHEN THE MEANS OF PREVENTING WAR (1928) [1]

Preamble

(List of Heads of States)

Being sincerely desirous of developing mutual confidence by strengthening the means of preventing war;

Noting that to this end the task of the Council of the League of Nations in ensuring peace and conciliation might be facilitated by undertakings assumed voluntarily in advance by the States;

Have decided to achieve their common aim by means of a treaty and have appointed as their plenipotentiaries:

(List of plenipotentiaries)

who, having deposited their full powers found in good and due form, have agreed on the following provisions:

ARTICLE 1. The High Contracting Parties undertake, in the event of a dispute arising between them and being brought before the Council of the League of Nations, to accept and apply provisional recommendations by the Council relating to the substance of the dispute and designed to prevent any measures being taken by the parties which might have a prejudicial effect on the execution of an arrangement to be proposed by the Council.

ARTICLE 2. In the case provided for in Article 1, the High Contracting Parties further undertake to refrain from any measures which might aggravate or extend the dispute.

ARTICLE 3. In the event of hostilities of any kind having broken out, without the possibilities of a peaceful settlement having in the Council's opinion been exhausted, the High Contracting Parties undertake to comply with the recommendations which the Council may make to them for the cessation of hostilities, prescribing, in particular, the withdrawal of forces having penetrated into the territory of another State, or into a zone demilitarised in virtue of international treaties, and in general inviting them to respect each other's sovereignty and any obligations assumed in regard to demilitarised zones.

ARTICLE 4. High Contracting Parties between whom hostilities may have broken out undertake to lend themselves to any action which may be decided upon by the Council with a view to ensuring the observance and execution of the measures it may have recommended in conformity with Article 3.

ARTICLE 5. In the cases referred to in Article 3 and 4, the High Contracting Parties undertake to act in accordance with the recommendations of the Council, provided that they are concurred in by all the members other than the representatives of the parties which have engaged in hostilities.

ARTICLE 6. The provisions of the present Treaty shall only apply on the basis of reciprocity, *i.e.*, in respect of disputes between the High Contracting Parties.

ARTICLE 7. The present Treaty may not be interpreted as entailing any change in the task of the Council of the League of Nations as laid down in the Covenant.

ARTICLE 8. The present Treaty shall bear to-day's date;[2] it shall be ratified. The instruments of ratification shall be forwarded to the Secretary-General of the League of Nations, who shall notify their receipt to all Members of the League.

ARTICLE 9. The present Treaty shall enter into force as soon as all the ratifications have been deposited.

The present Treaty, done in one copy, shall be deposited in the archives of the League of Nations.

The Secretary-General of the League of Nations shall be requested to deliver certified true copies to all the High Contracting Parties.

[1] League of Nations, Documents of the Preparatory Commission for the Disarmament Conference, Series VII (Geneva, 1928), p. 123.

[2] Date of signature.

ARTICLE 10. The present Treaty shall be concluded for a period of .....

ARTICLE 11. The present Treaty shall be registered by the Secretary-General of the League of Nations on the date of its entry into force.

In faith whereof the above-mentioned plenipotentiaries have signed the present Treaty.

Done at ..... on .....

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